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No. 97-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?*

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* The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carole Kolstad respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 8, 1998.

OPINIONS BELOW

The January 22, 1996 decision of the district court denying respondent's motion to set aside the jury verdict, which is reported at 912 F. Supp. 13 (D.D.C. 1996), is set out at pp. 69a-74a of the Appendix. The original panel decision in the court of appeals, which is reported at 108 F.3d 1431 (D.C. Cir. 1997), is set out at pp. 42a-68a of the Appendix. The orders of the court of appeals denying rehearing and granting rehearing en banc limited to the issue of punitive damages are set out at pp. 75a-77a of the Appendix. The en banc decision of the court of appeals,

which is reported at 139 F.3d 958 (D.C. Cir. 1998), is set out at pp. 1a-41a of the Appendix.

JURISDICTION

The en banc decision of the court of appeals was entered on May 8, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent portions of 42 U.S.C. § 1981a are set out at p. 78a-80a of the Appendix.

STATEMENT OF THE CASE

Petitioner commenced this action in 1994 in the United States District Court for the District of Columbia, alleging that she had been denied a promotion because of her sex in violation of Title VII of the 1964 Civil Rights Act. The complaint sought back pay, injunctive relief and punitive damages.

The case was tried to a jury, which found that petitioner had indeed been the victim of intentional discrimination on the basis of sex. The district court denied respondent's post-trial motion for judgment as a matter of law on the merits of petitioner's discrimination claim. (App. 69a-74a). The court of appeals panel which first heard this case unanimously upheld the jury's finding of intentional discrimination. (App. 46a-49a). The court of appeals declined to grant rehearing en banc with regard to the liability determination, and that aspect of the case is no longer at issue.[1]

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[1] The panel decision overturned the district court's decision denying injunctive relief and counsel fees, and remanded for further consideration of those issues.

The question which was addressed by the court of appeals en banc, and which is the subject of this petition, concerns petitioner's claim for punitive damages. Title VII was amended in 1991 to authorize awards of punitive damages; the provision regarding those awards is codified in 42 U.S.C. § 1981a. In support of her claim for punitive damages, petitioner offered at trial four types of evidence. First, petitioner demonstrated that the discrimination at issue was not the isolated spontaneous act of a lower level supervisor, but the result of a three month scheme involving respondent's national Executive Director and other high-level executives. As part of that scheme, respondent's officials (i) repeatedly met with the successful male candidate about the promotion, while refusing to meet with petitioner,[2] (ii) accorded only the male candidate a formal interview by respondent's Executive Director,[3] and (iii) made a last minute change in the job description of the position at issue so that it would conform to

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[2] "Before ADA posted the opening, [the male candidate] Spangler frequently met with the incumbent (Jack O'Donnell), ADA did not post the position promptly after O'Donnell decided to retire, and a secretary familiar with the process testified that she thought Spangler was being groomed for the job. Leonard Wheat, head of ADA's Washington office and the person most closely supervising the competing candidates, refused to meet with Kolstad to discuss O'Donnell's position, despite frequently meeting with Spangler." (App. 38a).

[3] "Although Executive Director Dr. William Allen formally appointed O'Donnell's successor, Allen—based in ADA's Chicago headquarters—relied heavily upon Wheat's recommendation of Spangler. Assigning all legislative work to Spangler, Wheat repeatedly refused Kolstad's requests to work on legislative matters, despite their relevance to the regulatory issues when covered and her experience in the field. Formally interviewing Spangler but not Kolstad, Allen failed to review Kolstad's numerous, detailed, positive performance evaluations." (App. 38a).

the male candidate's background.[4] Second, petitioner showed that the very discriminatory technique used against her had been the subject of an earlier class action lawsuit against respondent,[5] and that respondent had agreed in 1984 to a consent decree which forbad promotion by pre-selection;[6] the position at issue in this case was the second highest position in the ADA's Washington office and the first executive-level job to be filled there following the expiration of that decree. (App. 43a). Third, petitioner proved that the explanation which respondent offered at trial for selecting the male candidate was entirely different from the explanation which it

[4] "[A] few days before posting the job, [the ADA's Executive Director] edited the description to fit [the male's] qualifications. [The incumbent's] position description originally stated that its 'most important responsibility' was to '[m]aintain liaison with federal agencies, bureaus and Administration,' corresponding directly to Kolstad's work at ADA. Tailoring the job description to [the male's] specialty, [the selecting official] added...whole phrases from the position description questionnaire used to hire [the male]." (App. 38a-39a).

[5] In *Resnick v. American Dental Ass'n*, 90 F.R.D. 530, 536-41 (N.D. Ill. 1981), the district court in Chicago, where the ADA maintains its headquarters, certified a nationwide class of women in a suit brought against the ADA under Title VII and the Equal Pay Act. (App. 39a). In *Resnick*, Plaintiffs had alleged that the ADA had engaged in the systemic denial of promotions to women to high-level "supervisory and management positions" which "perpetuates and exacerbates...policies and practices of discrimination." 90 F.R.D. at 534 (internal quotation marks omitted).

[6] "Kolstad proffered a 1984 consent decree [in *Resnick*, which]...showed that ADA had specific knowledge of the impropriety of preselection as well as of the connection between preselection and employment discrimination..., [t]he decree stated that 'pre-selection of a favored candidate is contrary to ADA's firm policy of giving full and fair consideration to each application,... [v]iolations of [which]...will be cause for discipline.'" (App. 39a).

had given at the time of the selection,[7] and offered evidence that respondent had altered documents to justify its selection of the male candidate.[8] (App. 39a). Fourth, petitioner offered evidence that the director of respondent's Washington office, whose recommendation of the male candidate was accepted by the national headquarters, had repeatedly told sexually offensive jokes at staff meetings and had referred to several prominent professional women in gender-specific derogatory terms.[9] Despite this evidence, the district court refused to give the jury an instruction regarding punitive damages.[10] A divided panel of the court of appeals held that the district court had erred in dismissing petitioner's punitive damage claim; the panel majority and a dissenting judge

[7] "After telling [Kolstad] that she was passed over because she lacked experience with health care reform and was too valuable in her position, ADA abandoned that justification at trial, instead attacking Kolstad's general qualifications and writing ability." (App. 39a).

[8] "[T]he jury could have concluded that ADA attempted to cover up [the male's] preselection" by "edit[ing]" the position description, by "[t]ailoring" it to fit the male's "specialty" and that ADA had "altered documents to justify his promotion." (App. 38a-39a). Based on the trial record, the jury could have found that "Kolstad was the more qualified of the two candidates," that the less experienced "male candidate" "technically failed to meet the minimum posted requirements for the position." (App. 37a-38a).

[9] "Kolstad's supervisor whose advice [the selecting official] relied on in deciding to promote [the male employee] instead of Kolstad, told sexually offensive jokes at the office and referred to professional women as 'bitches' and 'battleaxes.'" (App. 40a).

[10] Plaintiff asked the district court to follow a then recent District of Columbia Circuit decision regarding punitive damages under 42 U.S.C. § 1981, which had held that evidence sufficient to support a finding of intentional discrimination would also support an award of punitive damages. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).

offered sharply differing views as to the legal standard for awarding punitive damages under section 1981a of Title VII. (App. 49a-53a, 57a-58a). The court of appeals granted rehearing en banc limited to this issue. (App. 75a-76a).

A narrowly divided en banc court adopted an extraordinarily stringent limitation on punitive damages awards under Title VII and sustained the rejection of petitioner's punitive damage claim. Five members of the en banc court joined in an opinion written by Judge Williams, who had dissented from the original panel decision. Five other members of the court joined in an opinion, written by the author of that panel decision, Judge Tatel, endorsing a substantially less restrictive standard. The eleventh member of the court of appeals, who cast the tie breaking vote, proclaimed "the matter is exceedingly close", and concurred in Judge Williams' opinion on the ground that "the language of § 1981a(b)(1) will bear the meaning the majority opinion ascribes to it." (App. 23a).

The majority opinion held that "punitive damages in a Title VII case may be imposed only on a showing of egregious conduct" (App. 2a), "truly outrageous acts of discrimination." (App. 21a n. 9). The majority dismissed intentional discrimination on the basis of sex, race or religion as a "garden variety" violation of the law insufficient by itself to warrant submission of petitioner's punitive damage claim to the jury. (App. 18a). Although section 1981a expressly authorizes punitive awards if the plaintiff proves that discrimination occurred as a result of "reckless indifference" on the part of an employer, the majority held that a plaintiff could not meet that standard by showing that the employer *intentionally* discriminated and *deliberately* violated Title VII.

The majority conceded that its standard appeared to be at odds with the actual language of section 1981a. "[S]ince

recklessness is typically subsumed within intent in the *mens rea* taxonomy, it might appear logical to read § 1981a(b)(1) as authorizing punitive damages whenever intent is shown." (App. 6a). Similarly, Judge Randolph acknowledged

> the common legal notion . . . that "[w]hen recklessness suffices to establish an element, such an element also is established if a person acts purposely or knowingly." If one fed this data into a parsing machine, it would answer— . . . whenever there is intentional discrimination there is at least reckless disregard.

(App. 23a). Judge Randolph, however, dismissed these textual arguments as "linguistic points." (*Id.*).

The majority acknowledged that its decision was contrary to the standard applied by the Second Circuit. (App. 20a). It recognized that Congress intended to base the Title VII punitive damage standard on the standard applicable to punitive damages claims under section 1981 (App. 10a), and emphasized that there was a "circuit split" regarding the section 1981 standard. (App. 8a-9a).

The five dissenters objected that the majority opinion was inconsistent with the language of the statute, which expressly authorizes punitive awards in cases of "reckless indifference." The rule adopted by the majority, they argued, "read the reckless indifference standard out of the statute." (App. 35a). The dissenters also objected to the "egregiousness" requirement on the ground that "section 1981a(b)(1) never mentions egregiousness." (App. 24a). The dissenting opinion agreed that its difference with the majority regarding the standard for punitive awards under Title VII derived from a division among the circuits regarding section 1981 punitive damage awards. (App. 32a-33a). The five dissenters also

argued that the standard adopted by the majority was inconsistent with this Court's decisions in *Smith v. Wade*, 461 U.S. 30 (1983), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). (App. 25a-29a).

REASONS FOR GRANTING THE WRIT

In 1991 Congress amended Title VII to authorize for the first time punitive damage awards for violations of that statute. Punitive damages are authorized if the respondent

> engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. §1981a(b)(1). Such awards are not permitted against government defendants or for practices that were unlawful solely because they had a disparate impact. 42 U.S.C. §§ 1981a(a)(1), 1981a(b)(1).

This case presents a multi-faceted conflict regarding when punitive damages can be awarded under Title VII against employers guilty of intentional discrimination. Since 1991, a wide variety of inconsistent rules have been adopted by the various circuits regarding such awards. As the court of appeals in the instant case frankly recognized, these differences regarding punitive damage awards under Title VII have their roots in a longstanding inter-circuit conflict regarding the standard for such awards under 42 U.S.C. § 1981. (App. 8a-9a). This Court granted certiorari in 1996 to resolve that underlying § 1981 issue, but that case was

dismissed as moot after a settlement was reached. *Merrill v. Barbour*, *cert. granted in part*, 116 S.Ct. 805,[11] *dismissed as moot*, 116 S.Ct. 1037 (1996). The confusion among the lower courts also stems from a disagreement among those courts about the meaning of several decisions of this Court, particularly *Smith v. Wade*, 461 U.S. 30 (1983).

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF SEVEN OTHER CIRCUITS

(a) The majority of the en banc court below adopted two core holdings. First, it concluded that the existence of intentional discrimination on the part of an employer could never by itself be sufficient to permit an award of punitive damages. (App. 5a). Second, the en banc majority held that the proper standard for determining the availability of punitive damages turns on the type of discriminatory practices in which an employer had engaged, and that such awards may be made only for discriminatory practices that are "egregious." "We . . . hold that punitive damages in a Title VII case may be imposed only on a showing of egregious conduct." (App. 2a). That standard cannot be met by "garden-variety" intentional discrimination (App. 18a); a plaintiff must prove the existence of "truly outrageous acts of discrimination." (App. 21a n. 9).[12] Judge Randolph, who cast the deciding

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[11] The Court granted certiorari limited to Question 2 of the petition, which was

> "Whether *Smith v. Wade*, 461 U.S. 30 (1983), permits an award of punitive damages in every case under 42 U.S.C. § 1981 in which there is a finding of intentional discrimination."

Petition for Writ of Certiorari, *Merrill v. Barbour*, No. 95-27, p. i.

[12] *See* App. at 20a("The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages.")

vote, insisted that punitive damages could be permitted in "only the worst cases." (App. 23a).

The courts of appeals for the First, Second, Eighth and Tenth circuits have expressly considered and rejected the very doctrine embraced by the District of Columbia Circuit. The court below candidly recognized that its decision conflicts with the Second Circuit opinion in *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997). (App. 20a). In *Luciano*, the defendant advanced, and the court of appeals rejected, the rule adopted by the court in this case.

> The Company argues that Section 1981 of the Civil Rights Act of 1991 was intended to limit the availability of punitive damages to cases of "extraordinarily egregious" conduct. . . . We find nothing in the language of the statute to support the Company's argument that there must . . . be a finding that the defendants' conduct was "extraordinarily egregious." . . . [The defendant] contends that remarks of Senator Dole and Representative Hyde . . . support its interpretation that the punitive damages provision requires a showing of "extraordinarily egregious" conduct. The short answer to this is that the plain language of the statute . . . is inconsistent with these statements.

110 F.3d at 219-220. The court below relied on the identical remarks of Senator Dole that were rejected by the Second Circuit in *Luciano*. (App. 10a).

In *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), the Eighth Circuit endorsed both *Luciano* and the original panel decision in this very case.

> We do not agree that the 1991 Civil Rights Act, 42 U.S.C. § 1981a(b)(1), limits the availability of punitive damages to "exceptional circumstances of unusual bad motive that transcends ordinary intentional misconduct." The Second Circuit rejected a similar argument in *Luciano . . . accord Kolstad v. American Dental Ass'n*, 108 F.3d at 1437-39.

123 F.3d at 1065-66. The Tenth Circuit rejected any egregiousness requirement in *Adakai v. Front Row Seat, Inc.*, 125 F.3d 861, —, 1997 WL 603458 at *2 (10th Cir., Oct. 1, 1997)("The defendant's acts need not have been 'extraordinarily egregious' to support a finding of punitive damages."). The First Circuit has twice held that under all federal civil rights statutes authorizing punitive damages proof of intentional discrimination is sufficient per se to warrant such an award. *Criado v. IBM Corp.*, 1998 WL 282836 (1st Cir., June 5, 1998),[13] *petition for rehearing pending*;[14] *Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998).[15]

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[13] "This circuit has held that under federal law the evidence of intent that is necessary to support a punitive damages award 'is the same [evidence of] "intent" that is required for a finding of discrimination in the first place.' *Dichner v. Liberty Travel* . . . ." 1998 WL 282836 at *8.

[14] The defendant in *Criado* has sought rehearing on the ground that the decision in that case is in conflict with the en banc decision in the instant case. Petition for Rehearing, *Criado v. IBM Corp.*, No. 97-1342 (1st Cir.), pp. 7-8.

[15] "Under a federal antidiscrimination statute that provides for punitive damages (like the ADA), a jury may be allowed to assess such damages 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.' *Smith v. Wade*, 461 U.S. 30, 56 . . . . A jury need not find some special sort of malign purpose in order to exact punitive damages in a disparate treatment case because the 'intent' that is necessary to undergird an award of punitive damages in such a case is the same 'intent' that is required for a finding of discrimination in the first place." 141 F.3d at 33-34.

Under the standard applied by the First, Second, Eighth and Tenth Circuits, it would have been error to refuse to charge the jury in this case on punitive damages.[16]

Outside the District of Columbia Circuit, the prevailing rule is that the availability of punitive damages turns, not on the particular type of discriminatory practices in which an employer may have engaged, but on the discriminator's mental state. In the First Circuit, punitive damages may be awarded if there was "consciousness of wrongdoing" on the part of the employer. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996). The Ninth Circuit authorizes such awards on a showing that "the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'" *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998). The Eighth Circuit holds that the "reckless indifference" required by the

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[16] As the en banc majority noted, the law in the Seventh Circuit varies from panel to panel. (App. 20a n.8). In *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 581 (7th Cir. 1996), that circuit held

> [E]vidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the [factfinder] to award punitive damages, provided the [court or jury], in its discretionary moral judgment, finds that the conduct merits a punitive award. No additional evidence [of reckless indifference] is needed.

This is the standard adopted in *Luciano* and rejected by the en banc court in this case. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995), upheld an award of punitive damages based on a single case of discriminatory termination plus "a smidgen" of sexual harassment. *Jonasson v. Lutheran Child and Family Services*, 115 F.3d 436, 438 (7th Cir. 1997), approved such punitive awards for "intentional disregard for the statutory rights of . . . female employees". On the other hand, *Lindale v. Tokheim Corp.*, 1998 WL 272763 *6 (7th Cir. May 29, 1998), requires proof of some sort of "circumstances of aggravation", such as "a pattern of flouting of the law."

statute can be demonstrated by proof that the defendant "knew what constituted unlawful employment practices", *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066 (8th Cir. 1997), or by proof, in a harassment case, that the harassers acted "knowing that [their language] would offend a reasonable person in [the plaintiff's] position." *Delph v. Dr.Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 358 (8th Cir. 1997). The conscious wrongdoing rule applied in the First, Eighth and Ninth Circuits is similar to the standard proposed by the five dissenting judges in the court below. (App. 25a-26a. 29a-30a).

Three circuits apply a rule that punitive damages may be awarded if the proven intentional discrimination was perpetrated by an individual who was part of "management" or "higher management". *Lindale v. Tokheim Corp.*, 1998 WL 222763 *6 (7th Cir. May 29, 1998)("involvement of higher management" among the aggravating circumstances warranting punitive damages); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997)("The requisite level of recklessness . . . can be inferred from management's participation in the discriminatory conduct"); *Adakai v. Front Row Seat, Inc.*, 1997 WL 603458 *2 (10th Cir. Oct. 1, 1997)("The requisite level of recklessness or outrageousness [required to support punitive damages] can be inferred from management's participation in the discriminatory conduct.")(Insertion in original)(*citing Kim v. Nash Finch Co.*). Had the instant case arisen in the Seventh, Eighth or Tenth Circuits, punitive damages would have been entirely permissible in this case, since, as the undisturbed panel decision noted (App. 47a-48a), and the en banc dissenters emphasized (App. 38a-39a), the proven discrimination occurred at the hands of respondent's national Executive Director.

A number of circuits also hold that punitive awards are proper if an employer perpetrated the discrimination through a deliberate scheme, engaged in duplicitous behavior, or lied about its actions or motives. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066-67 (8th Cir. 1997)(relying on fact that perpetrator both lied and doctored victim's personnel file); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 582 (7th Cir. 1996)(punitive award justified where employer "attempted[ed] to deceive the court, by presenting false reasons for its decision to discharge"); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997) (relying on discriminator's actions "in falsifying documents to establish a paper trail"). As the dissenting opinion below properly emphasized (App. 37a-40a), the facts of this case easily satisfy these requirements.[17] On the other hand, the Sixth Circuit holds that duplicity is not a legally sufficient basis for punitive damages, *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996), and the majority below necessarily rejected the standards accepted in the Fifth, Seventh and Eighth Circuits.

The court below, although acknowledging the existence of a conflict regarding the standard under Title VII for punitive damages, sought to minimize its difference with the other circuits by proposing to define the issue simply as whether section 1981a requires proof of *anything* more than intentional discrimination. As to that issue, of course, there is a clear inter-circuit conflict. Moreover, as the dissent below suggested, even the circuits which require more than proof of intentional discrimination require far less than does

[17] E.g. App. 38a-39a (jury "could have concluded" based on evidence before it that respondent had "altered documents" and had "attempted to cover up" the pre-selection of the male candidate.)

the District of Columbia Circuit, and virtually all other circuits adhere to a legal standard that would readily be satisfied by the circumstances of this case.

(b) The en banc majority expressly refused to apply to a Title VII discrimination claim the standard which is applied in that circuit to a section 1981 discrimination claim. In the District of Columbia Circuit, the punitive damages standard in section 1981 cases is avowedly different from and far less restrictive than that circuit's standard for Title VII cases. In a section 1981 case "evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided the jury, in its 'discretionary moral judgment'. . . . finds that the conduct merits a punitive award. . . . No additional evidence is required." *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995). This is precisely the standard which the court below rejected for Title VII claims. Thus, the availability of punitive damages in a race discrimination case in that circuit depends on whether the plaintiff has sued under section 1981 or under Title VII, and sex discrimination victims now have less effective remedies than do race discrimination victims, precisely the anomalies that Congress sought to correct when it amended Title VII in 1991.

This approach has been generally rejected by the other courts of appeals. Most adhere to the view expounded by the Fifth Circuit that Congress intended that a single standard be applied to all such punitive damage claims, regardless of whether they arose under Title VII or section 1981 and regardless of whether the discrimination at issue was on the basis of race, national origin, gender or religion.

> Congress's [sic] primary concern with enacting punitive damages under § 1981a(b)(1) was to unify the law under Title VII. . . . In furtherance of this

> unification effort, Congress permitted the imposition of punitive damages under Title VII in the same general circumstances as punitive damage awards imposed by courts under § 1981 . . . . Accordingly, we shall consider the propriety of punitive damage awards under §§ 1981 and 1981a under the same criteria.

Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 941-42 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997). The Eighth and Ninth Circuits have expressed a similar view. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066 (8th Cir. 1997)(punitive damages available under section 1981a "to the same extent and under the same standards that are available to plaintiffs under 42 U.S.C. § 1981"); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1301-04 (9th Cir. 1998). Decisions in the First,[18] Second,[19] and Fourth[20] Circuits repeatedly apply section 1981 caselaw in determining the availability of punitive damages under Title VII. Only in the

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[18] *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996)(*citing Rowlett v. Anheuser-Busch, Inc.*,832 F. 2d 194 (1st Cir. 1987). The First Circuit has twice cited *Rowlett* for a more general rule that in *all* federal civil rights cases proof of intentional discrimination is sufficient to warrant an award of punitive damages. *Criado v. IBM Corp.*, 1998 WL 282836 *8 (1st Cir. June 5, 1998)("*Rowlett* held that a finding of intentional discrimination is sufficient to warrant punishment for a defendant"); *Dichner v. Liberty Travel*, 141 F.3d 24, 34 (1st Cir. 1998) (quoting *Rowlett* for the rule that in an intent case "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable.").

[19] *Luciano v. Olsten Corp*, 110 F.3d 210, 220 (2d Cir. 1997)(*citing Rowlett*).

[20] *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 983 (4th Cir. 1997)(*citing Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir. 1987)).

District of Columbia Circuit is the availability of punitive damages avowedly more restricted in Title VII cases than in suits brought under section 1981.

(c) These conflicting Title VII standards have arisen in large measure because there are differing standards among the circuits regarding when awards of punitive damages are permissible under section 1981 itself. The majority below frankly acknowledged that widespread conflict.

> [T]he circuits are *deeply divided* as to the proper standard for punitive liability under § 1981. . . . Four courts of appeals have held that egregious misconduct beyond mere intent to discriminate is required for punitive damages under § 1981 . . . . Three other circuits have held that a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual sec. 1981 case . . . . [T]he House Report reflects this circuit split.

(App. 8a-9a) (Emphasis added). The dissenters agreed that "our sister circuits have split over the meaning of *Smith [v. Wade]*," (App. 33a), noting the existence of

> two irreconcilable section 1981 cases—*Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1987), limiting punitive damages to "egregious" cases, and *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205-06 (1st Cir. 1987), holding that plaintiffs need prove nothing beyond intentional discrimination for juries to consider punitive damages. The Court's egregiousness standard comports with *Beauford*. My interpretation of section 1981a comports with *Rowlett*.

(App. 32a).

The leading section 1981 case disapproved by the en banc court below, despite having been cited in the House Report on the 1991 Civil Rights Act, is *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987)[21]. The First Circuit opinion in that case was joined by then Judge Breyer. *Rowlett* held that the phrase "reckless indifference," words later incorporated verbatim in the 1991 Act, mean that

> punitive damages are within the jury's discretion in cases requiring proof of intentional wrongdoing . . . . In such cases, the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable. That does not mean that punitive damages are appropriate in each case of an intentional wrong, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary.

832 F.2d at 205. The en banc court below expressly refused to apply this standard. (App. 9a-10a). Conversely, *Rowlett* expressly rejected the requirement, adopted below, that a victim of intentional discrimination must also adduce proof of "aggravating circumstances." 832 F.2d at 205-06.

The First Circuit reiterated this view in *Hernandez-Tirado v. Artau*, 874 F.2d 866, 868 (1st Cir. 1989), on which the dissenters below expressly relied. (App. 30a). That decision, written by then Judge Breyer, reasserted that "reckless indifference" under section 1983 could ordinarily be demonstrated by evidence of an intentionally discriminatory act. 874 F.2d at 868. *Hernandez-Tirado* explained, as did the dissenters below (App. 29a-30a), that that standard would not mean that punitive damages could be awarded in *all* cases

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[21] "*Rowlett* . . . supports Kolstad's position, while . . . *Beauford* . . . supports ADA's position." (App. 9a).

of intentional discrimination, because there could be situations in which it was not clear whether the intentional action was unlawful; in such instances the defendant's action would not involve reckless indifference. 874 F.2d at 869-71. The en banc court below, however, vehemently rejected that approach. (App. 18a).[22]

Two years ago, this Court granted certiorari to resolve the circuit conflict involving the underlying § 1981 issue, but that case was dismissed as moot after a settlement was reached. *Merrill v. Barbour*, *cert. granted in part*, 116 S.Ct. 805, *dismissed as moot*, 116 S.Ct. 1037 (1996).

II. THE DECISION BELOW IS IN CONFLICT WITH THREE DECISIONS OF THIS COURT

The five dissenting judges below properly concluded that the majority opinion is inconsistent with this Court's opinions in *Smith v. Wade*, 461 U.S. 30 (1983), *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). (App. 24a-28a). The circuit courts which have rejected the "egregiousness" requirement adopted by the court below have repeatedly concluded that

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[22] *Compare* App. 16a (rejecting as a meaningless distinction a rule under which "[i]f the scope or nature of a given right is sufficiently obscure, a defendant might *intentionally* discriminate but be merely *negligent* as to the existence of the right")(emphasis added) *with* 874 F.2d at 870 ("Although [the defendant's] dismissal of Hernandez was an '*intentional*' tort, the dismissal was *negligent* in respect to the existence of a federally protected right.")(Emphasis added).

this Court's decision in *Smith v. Wade* precludes adoption of any such standard.[23] The Ninth Circuit recently observed that since the decision in *Smith v. Wade* "many other decisions [in the circuit courts have] departed from *Wade's* approach." *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1302 (9th Cir. 1998).

The court below recognized that the actual language of section 1981a was expressly taken from *Smith v. Wade*, and the legislative history makes clear Congress' intent to adopt the standard in *Smith*. (App. 10a). The majority below, however, "construe[d] *Smith* as establishing a threshold requirement of egregiousness for the imposition of punitive damages in § 1983 cases—a requirement which Congress transferred largely intact to § 1981a(b)(1)." (App. 12a). On this interpretation of *Smith* neither an intent to discriminate on the basis of race or sex, nor an intent to violate the Constitution, would be sufficient under *Smith* to warrant the imposition of punitive damages.

This surprising conclusion assuredly stands *Smith v. Wade* on its head. The issue in *Smith v. Wade* was whether punitive damages in section 1983 cases should be *limited* to instances of intentional wrongdoing, or should be extended as well to cases of reckless indifference. The majority opinion,[24]

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[23] *Criado v. IBM Corp.*, 1998 WL 282836 at *8 (*citing Smith v. Wade*); *Dichner v. Liberty Travel*, 141 F.3d at 33 (*citing Smith v. Wade*); *Luciano v. Olsten Corp.*, 110 F.3d at 220 (*citing Smith v. Wade*); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d at 582 (*citing Smith v. Wade*); *Kim v. Nash Finch Co.*, 123 F.3d at 1066 (*citing Smith v. Wade*).

[24] 461 U.S. at 47 (punitive damages awardable for "evil motive" as well as reckless indifference), 54 (punitive damages appropriate for "*all* intentional or reckless invasions of the rights of others")(emphasis in original).

the dissenting opinion of then Justice Rehnquist,[25] and the dissenting opinion of Justice O'Connor,[26] all agreed that such intentional wrongdoing would warrant an award of punitive damages. The actual holding of the Court's decision was as follows:

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

461 U.S. at 56. Nothing in this formulation contains any reference to egregiousness; intentional discrimination on the basis of race or sex would assuredly constitute just such an "evil motive or intent," except in those circumstances in which the legality of the action might fairly have been in dispute. The First Circuit correctly rejected the D.C. Circuit's interpretation of *Smith v. Wade*.

> The Court [in *Smith*] made no mention of any requirement that, in addition to charging the jury about the level of intent necessary to support punitive damages, a trial court also explain to the jury that the misconduct be "extraordinary" or

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[25] 461 U.S. at 56 ("some degree of bad faith or improper motive"), 57 ("Wrongful intent", "evil intent"), 60 ("some sort of wrongful motive . . . or intentional doing of an act known to be unlawful"), 64 ("evil motive"), 72 ("evil motive"), 73 (an "intentional wrong"), 74 ("guilty intention", "wrongful intention"), 75 ("evil motive"), 78 ("some showing of wrongful intent"), 79 ("evil motive"), 84 ("evil motive", "wrongful intent"), 87 ("wrongful intent").

[26] 461 U.S. at 94 (punitive damages appropriate for "intentional . . . violations of constitutional rights").

> "outrageous." We will not construe this silence as a mere inadvertent lapse.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d at 206.

The decision below conflicts as well with this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Both of these decisions construe the provision of the ADEA authorizing awards of liquidated damages for "willful" violations of the ADEA, and hold that a violation of the law is willful if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S. 126. The "reckless disregard" standard in *Thurston* and *Hazen Paper* is indistinguishable from the "reckless indifference" standard in Title VII. *Thurston* holds that this standard is met by proof that the employer "wholly disregard[ed] the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." *Id.*. That standard is assuredly satisfied by a finding of intentional discrimination on the basis of sex absent a claim—not advanced in this case—that the defendant had some reason to believe that the proven discrimination was lawful.

Only five years ago, this Court in *Hazen Paper* emphatically rejected an argument indistinguishable from that adopted by the District of Columbia Circuit in this case. The Court noted that the lower courts had frequently disregarded the holding of *Thurston* in cases of intentional age discrimination against individual employees. Writing for a unanimous Court, Justice O'Connor observed that "[t]he chief concern of these Circuits," like the majority below, "has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows

or recklessly disregards the illegality of its conduct." 507 U.S. at 615-16. The holdings of the circuit court opinions disapproved by this Court were virtually indistinguishable from the en banc opinion in this case.

> At least one Circuit refuses to impose liquidated damages in such a case unless the employer's conduct was "outrageous". See, *e.g. Lockhard v. Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (CA3 1989). Another requires that the underlying evidence of liability be direct rather than circumstantial. See, *e.g.*, *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (CA8 1989).[27]

507 U.S. at 615. This Court rejected these proposed limitations.

> We . . . reaffirm that the *Thurston* definition of "willful"—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation . . . .

507 U.S. at 617. Intentional, knowingly illegal discrimination that is "reckless disregard" under the ADEA must assuredly be "reckless indifference" under Title VII.

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[27] A similar argument was made by the majority below. (App. 21a n.9).

III. THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

The number of cases affected by the question presented in this case is demonstrably substantial. According to the Administrative Office of the U.S. Courts, more than 24,000 employment discrimination cases are filed annually in federal court.[28] The EEOC receives more than 55,000 Title VII charges each year.[29] Although exact statistics are not available concerning the number of cases and charges alleging intentional discrimination under Title VII that are filed annually, they undeniably involve several thousand cases in the district courts and tens of thousands of Title VII charges.

The impact of the question presented in this case is clearly much greater than the analogous question under section 1981, which this Court granted certiorari to resolve two years ago in *Merrill v. Barbour*, *cert. granted in part*, 116 S.Ct. 805 (1996). As a practical matter, a decision by this Court regarding the standard for punitive damage awards under Title VII will inform, if not control, the standard for such awards under section 1981 and under other federal civil rights statutes where the controversy regarding that standard today divides the lower courts.[30]

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[28] Administrative Office of the United States Courts, *Table C-2A; U.S. District Courts Civil Cases Commenced, By Nature of Suit During 12 Month Periods Ended Mar. 31, 1994 through 1998*, Employment Civil Rights Cases for 12 Months Ended March 31, 1998: 24,111 cases.

[29] EEOC, *Title VII of the Civil Rights Act of 1964 Charges: FY 1991-FY 1997*, FY 1996: 55,388 charges; FY 1997: 58,615 charges (compiled 4/17/98).

[30] *E.g. Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998) (Americans with Disabilities Act); *United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992) (Fair Housing Act).

The majority below dismissed the intentional discrimination forbidden by Title VII as no more than a "garden variety" violation of federal law. (App. 18a). This attitude is entirely inconsistent with the profound importance which Congress has attached to federal anti-discrimination measures, which this Court has recognized to be "of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

Congress does not take a benign view of intentional discrimination in the workplace. Indeed, Congress expanded Title VII's remedies for victims of intentional discrimination to include punitive damages precisely because it found that backpay and equitable relief had proven inadequate "to deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. § 1981a Note. The notion that some forms of intentional unlawful discrimination are more acceptable than others likewise offends Congress' recognition in the Glass Ceiling Act (enacted the same day as section 1981a) that "despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management" because "artificial barriers exist to advancement...." 42 U.S.C. § 2000e Note, section 202(a)(1)-(2). Pre-selection of a favored candidate constitutes an insurmountable barrier to advancement by women and minorities to positions in management, as the ADA itself once recognized.

The problem of discrimination has led the nation to adopt four constitutional amendments, fight a Civil War, and fashion a sea change in the relationship of the states to the national government. The District of Columbia Circuit's dismissive attitude towards the evil of intentional discrimination undermines all enforcement of civil rights laws in that circuit. The proper understanding of the gravity of

intentional discrimination was correctly articulated in the First Circuit decision spurned by the majority below.

> In a case involving intentional race discrimination the explanation of the twin purposes of punishment and deterrence is sufficient to guide the jury. After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 at 206.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 1997 Decided May 8, 1998

No. 96-7030

CAROLE KOLSTAD,
APPELLANT/CROSS-APPELLEE

v.

AMERICAN DENTAL ASSOCIATION,
APPELLEE/CROSS-APPELLANT

Consolidated with
No. 96-7047

Appeals from the United States District Court
for the District of Columbia
(No. 94cv01578)

Bruce S. Harrison and *Elizabeth Torphy-Donzella* argued the cause and filed the briefs for appellee/cross-appellant.

Joseph A. Yablonski argued the cause and filed the brief for appellant/cross-appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

J. Ray Terry, Jr., Deputy General Counsel, and *Robert J. Gregory*, Attorney, were on the brief for amicus curiae Equal Employment Opportunity Commission.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* TATEL, with whom *Chief Judge* EDWARDS, and *Circuit Judges* WALD, ROGERS and GARLAND join.

WILLIAMS, *Circuit Judge*: Carole Kolstad sued her employer, the American Dental Association ("ADA"), under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* At the close of evidence, the district court refused to instruct the jury on punitive damages. The jury awarded Kolstad back pay, and the district court denied ADA's motion for judgment as a matter of law on the issue of liability. A panel of this court reversed the district court's dismissal of Kolstad's punitive damages claim and remanded for a trial on punitive damages. *Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1437–39 (D.C. Cir. 1997). We granted *en banc* review on the question whether the standard of evidence for punitive damages under Title VII is, in all but a narrow range of cases, no higher than the standard for liability. We reject that view and hold that punitive damages in a Title VII case may be imposed only on a showing of egregious conduct. We further hold that no evidence of such behavior was shown at trial in this case, and thus affirm the district court on the issue of punitive damages.

* * *

ADA is a Chicago-based professional organization with an office in Washington. Jack O'Donnell worked in the Washington office, where he held the double-barreled title of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. The first role involved developing and advocating ADA's stance on federal legislation and regulations; the second entailed coordinating regular meetings of the Council on Governmental Affairs, a policy-making body composed of ADA members.

In September 1992 O'Donnell announced he would retire at year's end. Upon learning of O'Donnell's impending departure, Kolstad (then serving as ADA's Director of Federal Agency Relations) and Tom Spangler (then ADA's Legislative Counsel) each expressed interest in the vacancy. Since 1988, when Kolstad became responsible for federal regulatory matters at ADA, Leonard Wheat (the head of the Washington office) had repeatedly rated her performance as "distinguished." Before coming to ADA, Kolstad had spent six years in the General Counsel's office of the Department of Defense, where she drafted proposed legislation, prepared testimony for congressional hearings, and represented the Department's interests on Capitol Hill. Spangler began working at ADA in 1991. He dealt mainly with legislative matters, and had also received "distinguished" performance evaluations from Wheat. Before joining ADA, Spangler spent five years as a lobbyist for the National Treasury Employees Union. Both Kolstad and Spangler are lawyers. Each had worked directly with O'Donnell, Spangler principally supporting his lobbying efforts and Kolstad assisting his management of the Council.

Wheat asked Dr. William Allen, ADA's Executive Director in Chicago, to appoint O'Donnell's successor. After consulting with Wheat, Allen revised the "Position Description Questionnaire" for O'Donnell's job, incorporating verbatim elements of the Position Description Questionnaire that had been used to hire Spangler in 1991. (There is no evidence that the job has not in fact included those elements.) In October 1992 Wheat approved a performance evaluation of Spangler in which Spangler stated that one of his objectives for 1993 was to "provide management and administrative support ... for the Council on Government Affairs," work that O'Donnell was then performing.

Spangler formally applied for the vacancy once it was posted in November 1992. Kolstad also applied, after com-

plaining in a letter to Allen that Wheat had refused for several weeks to meet with her to discuss her interest in the position. Wheat interviewed both applicants and recommended Spangler for the job. In December 1992 Allen telephoned Kolstad to tell her that he had given the promotion to Spangler, explaining that she lacked experience with health care reform and was too valuable to ADA in her current position to take on O'Donnell's job.

Kolstad's claims of discrimination rest largely on the idea that ADA had in effect picked Spangler in advance of the formal selection process; seeing the formal process as largely facade, she contends that its artificial quality evidences intent to engage in sex discrimination. She also gave testimony, hotly contested, that Wheat told sexually offensive jokes at staff meetings and sometimes used derogatory terms to refer to prominent professional women.

After exhausting her administrative remedies before the Equal Employment Opportunity Commission, Kolstad filed suit, charging ADA with unlawful employment discrimination and seeking equitable relief, 42 U.S.C. § 2000e–5(g)(1), and damages, 42 U.S.C. § 1981a. At the close of the trial evidence, the district judge declined to give the jury the issue of punitive damages. The jury found that ADA had unlawfully discriminated against Kolstad on the basis of sex and awarded her $52,718 in back pay. The district court denied ADA's motion for judgment as a matter of law on liability. The court also held that Kolstad was not entitled to attorneys' fees or the equitable remedy of instatement. *Kolstad v. American Dental Ass'n*, 912 F. Supp. 13 (D.D.C. 1996).

A panel of this court affirmed the denial of ADA's motion for judgment as a matter of law, but reversed and remanded for trial on punitive damages and for reconsideration of Kolstad's claims for instatement and attorneys' fees. *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997). We granted rehearing *en banc* on the question whether the issue of punitive damages was properly withheld from the jury in this case. We conclude that it was, and affirm the district court.

* * *

Until 1991 successful plaintiffs in Title VII cases could only get "equitable" relief. See *Landgraf v. USI Film Products*, 511 U.S. 244, 252–53 (1994). In the Civil Rights Act of 1991, Congress authorized a broader range of monetary remedies for Title VII plaintiffs. The Act provides that a plaintiff who proves "intentional discrimination" in violation of Title VII may recover compensatory and punitive damages in addition to the equitable relief available under prior law. 42 U.S.C. § 1981a(a). A separate provision—the one at issue in this proceeding—limits the recovery of punitive damages to cases in which "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The sum of compensatory and punitive damages is capped at a total ranging from $50,000 and $300,000 depending on the employer's size. 42 U.S.C. § 1981a(b)(3).

We think that by enacting a separate provision setting out a special standard for the imposition of punitive damages, Congress showed that it did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII. The structure of the statute—one standard for basic liability, another for the exceptional remedy of punitive liability—strongly suggests that, before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination. To be sure, Congress's choice of language ("malice or ... reckless indifference to ... federally protected rights") hardly pinpoints what the content of that "something more" ought to be. Still less, however, does that language support either the rule proposed by Kolstad—that punitive damages should be available in every case strong enough to get to the jury on simple compensation—or even the marginally less permissive rule urged by the dissent.

We begin by rejecting Kolstad's broad assertion that a finding of intentional discrimination is enough to put the question of punitive damages before the jury in every Title

VII case.[1] Such an approach would conflict with the remedial structure of the statute, with legislative history indicating that Congress meant to reserve punitive damages for particularly egregious violations of Title VII, and with the Supreme Court's pronouncements on the purposes and availability of punitive damages. Kolstad's position does draw some superficial plausibility from the language of the statute: since recklessness is typically subsumed within intent in the *mens rea* taxonomy, it might appear logical to read § 1981a(b)(1) as authorizing punitive damages whenever intent is shown—in other words, whenever compensatory damages are available. It is a stretch, however, to conclude that, in expressing the standard for punitive damages in § 1981a(b)(1), Congress used terms whose meaning is clear or well settled. We said recently that mental-state standards like "recklessness" and "reckless disregard" are among the most malleable and ambiguous in the law. See *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668–69 (D.C. Cir. 1996); see also *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997). "Malice," too, is susceptible of a range of meanings. See *Smith v. Wade*, 461 U.S. 30, 41 n.8 (1983); *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). As we have said, the structure of the statute strongly points to a two-tiered scheme of liability; we decline to read the pliable and imprecise language of § 1981a(b)(1) to flatten that scheme.

The legislative history of the Civil Rights Act of 1991 supports the conclusion we reach today. The House Report stated:

> Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, *and must meet an even higher standard* (establishing that the employer acted with malice or reckless or callous indifference to their rights) *to recover punitive damages.*

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 72 ("House Report") (emphasis added).[2] Other statements from both sides of the legislative aisle indicate that Congress intended to establish an egregiousness requirement for punitive damages as a matter of law. See, e.g., 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Memo of Sen. Dole et al.) (punitive damages to be available only in "extraordinarily egregious cases"); 137 Cong. Rec. S 15479 (Oct. 30, 1991) (statement of Sen. Bumpers) ("[Y]ou have to allege and prove intentional, malicious, willful discrimination in order to receive [punitive] damages under this bill, and certainly that is as it should be. It is a heavy burden for plaintiffs.").

Of course, legislative history is not legislative text, and House Reports are not, as the dissent implies, authoritative sources for determining what Congress "intended" or "expected" or "wanted." Dissent at 8 (citing House Report at 69–70). Yet it bears mentioning that even among all the conflicting and "frankly partisan" congressional statements concerning the Civil Rights Act of 1991, see *Landgraf*, 511 U.S. at 262 & n.15, we find nothing to support the proposition that Congress intended to make punitive damages available on the same legal basis as compensatory damages in the typical run of Title VII cases.

To be sure, the House Report does say that § 1981a(b)(1) "sets the same standard courts have applied under [42 U.S.C.] section 1981," a Reconstruction-era civil rights statute prohibiting racial discrimination in the making and enforce-

[1] Neither compensatory nor punitive damages are available in so-called "disparate impact" cases, § 1981a(a)(1), or in "mixed motive" cases in which the defendant demonstrates that it would have taken the same action in the absence of the impermissible motivating factor, 42 U.S.C. § 2000e-5(g)(2)(B); see, e.g., *Sheppard v. Riverview Nursing Center*, 88 F.3d 1332, 1334 (4th Cir. 1996).

[2] This Report accompanied a House version of the 1991 Civil Rights Act whose punitive damages provision differed from that of the enacted legislation only in being arguably broader. The House bill allowed punitive damages to be awarded when the defendant engaged in a discriminatory practice "with malice, or with reckless *or callous* indifference to the federally protected rights of others." House Report at 12 (emphasis added). We have no reason to think that the ultimate deletion of the words "or callous" reflected a House purpose to *expand* the scope of punitive liability.

ment of contracts. House Report at 74. See also 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Interp. Memo of Rep. Edwards) ("Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981."). But a cross-reference to § 1981 (a statute that lacks a separate punitive damages provision) hardly counts as a firm view on the present question, for the circuits are deeply divided as to the proper standard for punitive liability under § 1981.

Four courts of appeals have held that egregious misconduct beyond mere intent to discriminate is required for punitive damages under § 1981—and had done so before enactment of § 1981a. See *Stephens v. So. Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (although evidence adequate to go to jury on intentional discrimination, and although any form of discrimination "constitutes reprehensible and abhorrent conduct," evidence nonetheless inadequate for punitive damages); *Beauford v. Sisters of Mercy–Province of Detroit*, 816 F.2d 1104, 1109 (6th Cir. 1987) (stating that punitive damages in civil rights actions have "generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant"); *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1182 (10th Cir. 1989) (upholding compensatory award, and affirming trial court's rejection of punitive damages in the absence of a showing of defendant's "personal animosity and malice" toward the plaintiff); *Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986) (finding that there was adequate evidence of intentional discrimination to support jury's finding of liability under § 1981 but that defendants had not "acted with either the requisite ill will or callous disregard" to justify punitive damages).

Three other circuits have held that a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual § 1981 case—although only two had done so at the time Congress enacted § 1981a. In *Rowlett v. Anheuser–Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987), the First Circuit applied to § 1981 a rule that "punitive damages are within the jury's discretion in cases requiring proof of intentional wrongdoing." In *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987), the Seventh Circuit appeared to say that punitive damages were available for racial discrimination under § 1981 so long as "the application of the law to the facts at hand was so clear at the time of the act that reasonably competent people would have agreed on its application."[3] And recently we held that the jury's (sustainable) "finding of intentional racial discrimination permitted it to find" the requisite ill will or reckless or callous indifference for punitive damages in a § 1981 case. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).

In fact, the House Report reflects this circuit split by citing two illustrative cases decided under § 1981—one of which, *Rowlett*, 832 F.2d at 205, supports Kolstad's position, while the other, *Beauford*, 816 F.2d at 1109, supports ADA's position. See House Report at 74. Perhaps the House Report could be said to invite each circuit to follow its own view of § 1981 in construing § 1981a, but such an approach seems unduly self-referential—and we note that at least two circuits have already rejected it. Both the First and the Seventh Circuit have endorsed a low threshold for punitive liability under § 1981, yet both appear to set a higher standard for

[3] The position of the Seventh Circuit on the availability of punitive damages under § 1981 is not wholly clear. *Williamson* appears to permit automatic imposition of punitive damages with limited allowance for a defendant's mistake on an obscure issue of law. However, in *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985), the court held that "[i]n a section 1981 action, a finding of liability for discrimination against a defendant does not automatically entitle the prevailing plaintiff to an award of punitive damages," and described the basis for punitive damages in terms of "outrageous conduct" and the "defendant's ill will against the plaintiff." And in *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986), the court upheld the verdict of intentional discrimination, finding the case basically a "swearing contest," and then upheld the award of punitive damages, but only after characterizing it as "a close ca[illegible]." Unless there was a higher evidentiary standard for punitive damages, it is hard to see why that case was "close" and the liability issue not.

punitive than for compensatory liability under § 1981a. Compare *Rowlett*, 832 F.2d at 205, with *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 507–09 (1st Cir. 1996); and compare *Williamson*, 817 F.2d at 1296, with *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996). Those courts' approach to § 1981a seems quite sound; the Report's indifferent citation to two antithetical opinions cannot reflect a focus on their exact meaning.

Significantly, even the cosponsors of § 1981a do not seem to have taken an expansive view of the availability of punitive damages under § 1981. "Under 42 U.S.C. § 1981, victims of intentional racial and ethnic discrimination are entitled not only to equitable relief, but also to compensatory damages. Further, *in egregious cases*, punitive damages may also be awarded." 137 Cong. Rec. S 15483 (Oct. 30, 1991) (Sponsors' Interp. Memo) (emphasis added).

Finally, the House Report also cites the Supreme Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983); see House Report at 74. More specifically, the Report includes a "pin cite" to the concluding passage of *Smith*, 461 U.S. at 56, in which the Court announced that "a jury may be permitted to assess punitive damages in an action under [42 U.S.C.] § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." That Congress ultimately enacted language similar to that employed in *Smith v. Wade* is clear; we now turn to the implications of that decision for our question.

Kolstad asks us to draw from *Smith v. Wade* the broad principle that the issues of compensatory and punitive liability must go to the jury on the same evidentiary standard in civil rights cases. But we do not read that decision—much less the House Report's isolated citation to *Smith*'s linguistic formula—to go so far. In *Smith*, an inmate sued a prison guard (among others) under 42 U.S.C. § 1983, alleging that the guard violated his Eighth Amendment rights by failing to protect him from violent physical and sexual abuse. The sole dispute was over the proper standard for punitive damages,

and because § 1983 makes no reference to such a remedy, the Court looked to common law for the answer. It rejected the proposition that "actual malicious intent—'ill will, spite, or intent to injure,'" *id.* at 37, was required for punitive damages, and held instead, as noted above, that they were allowable when the defendant's conduct was "motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others." *Id.* at 56.

The Court in *Smith* noted at the outset that *compensatory* damages had been assessed at trial on an extremely demanding standard, one which itself incorporated a requirement of egregiousness:

> In this case, the jury was instructed to apply a high standard of constitutional right ("physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities"). It was also instructed, under the principle of qualified immunity, that Smith could not be held liable at all unless he was guilty of "a callous indifference or a thoughtless disregard for the consequences of [his] act or failure to act," or of "a flagrant or remarkably bad failure to protect" Wade.

Id. at 50–51. Thus, while the criterion adopted by the Court for punitive damages was not egregious in relation to the applicable compensatory standard, it clearly was so in relation to ordinary tortious conduct. Any of the discriminatory acts penalized by § 1981a is deplorable and wrong, but not all rise (or sink) to equivalence with "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." Thus the decision in *Smith* supports rather than refutes the idea that some form of egregiousness is essential for punitive damages.

In fact, the Court made clear that "deterrence of future *egregious conduct* is a primary purpose . . . of punitive damages." *Id.* at 49 (emphasis added). It invoked common law standards using such terms as "injury . . . inflicted maliciously or wantonly," "criminal indifference to civil obligations," *id.* at 41 (quoting *Philadelphia, W. & B. R. Co. v. Quigley*, 62

U.S. 202, 214 (1859)), "wilful misconduct," and "conscious indifference to consequences," *id.* at 42–43 (quoting *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489, 495 (1876)). Tellingly, the Court drew its formulation of the appropriate standard for punitive damages from the Restatement of Torts, which says that punitive damages are allowable "for *conduct that is outrageous*, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1977) (emphasis added). The *Smith* Court quoted the Restatement's observation that punitive damages are awarded "to punish [the defendant] for his *outrageous conduct* and to deter him and others like him from similar conduct in the future." *Id.* § 908(1) (quoted in *Smith*, 461 U.S. at 54) (emphasis added). The comments to Section 908 add that punitive damages are only appropriate where there is "some element of outrage similar to that usually found in crime." *Id.*, comment b. See also *id.*, comment d (although award of punitive damages left to jury discretion, "[i]t is error ... to award punitive damages if there has been no bad motive or wanton indifference").

The Court itself has since recognized that even in its § 1983 context the *Smith* formula will commonly generate two tiers of liability. In a later § 1983 case in which a trial court's instructions had allowed the jury to include an impermissible element in calculation of compensatory damages, the Court considered whether the award could nonetheless be saved by recharacterizing it as punitive damages. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). The Court rejected this view, noting that punitive damages "are available only on a showing of the requisite intent," and citing as examples both *Smith* and the jury instructions in the case before it, which "authoriz[ed] punitive damages for acts 'maliciously, or wantonly, or oppressively done'." *Id.*

In short, then, we construe *Smith* as establishing a threshold requirement of egregiousness for the imposition of punitive damages in § 1983 cases—a requirement which Congress transferred largely intact to § 1981a(b)(1). This case does not require us to define this requirement with specificity, for

the evidence presented by Kolstad, as we will discuss shortly, fails to show egregiousness in any form. We think, however, that punitive damages would properly reach the jury where, for example, the evidence shows that the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite and malevolence,[4] or otherwise evinced a "criminal indifference to civil obligations," *Smith*, 461 U.S. at 41 (quoting *Philadelphia, W. & B.R. Co. v. Quigley*, 62 U.S. 202, 214 (1859)).

One might agree with this characterization of egregiousness and still contend that the determination of that threshold in individual cases has been entrusted by *Smith*—and hence derivatively by § 1981a(b)(1) as well—to the jury's "discretionary moral judgment." *Smith*, 461 U.S. at 52. We do not think § 1981a(b)(1) upsets the traditional relationship between court and jury in this fashion. Nor, in fact, do we think *Smith* itself granted unfettered discretion to juries to determine whether the minimum requirements for punitive damages have been met. The Court in *Smith* correctly pointed out that punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." 461 U.S. at 52. Rather, as the Eighth Circuit recently said in a § 1983 case, "punitive damages are awarded or rejected in a particular case at the discretion of the fact finder *once sufficiently serious misconduct by the defendant is shown.*" *Coleman v. Rahija*, 114 F.3d 778, 787 (8th Cir. 1997) (emphasis added). The *Smith* Court said that the jury retains "discretionary moral judgment" over the award of punitive damages, but this simply restates the commonplace that the jury can choose *not* to award them even when the evidence is sufficient to give it the choice. And indeed, none of the

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[4] The dissent for some reason equates our use of "malevolence" with the statutory term "malice," Dissent at 12, but as the Supreme Court made clear in *Smith*, such an equation is far from automatic. 461 U.S. at 41 n.8. To the extent that the reference to "malice" does mean malevolence, of course, the doctrine of *noscitur a sociis*—which counsels courts to construe statutory terms in harmony with the words that accompany them—argues against the dissent's broad reading of "reckless indifference."

authorities cited in *Smith* in support of the "discretionary moral judgment" proposition goes so far as to deny the court's traditional role in deciding whether a reasonable juror could find the defendant's conduct sufficiently egregious for the punitive damages issue to be submitted to the jury in the first instance. See, e.g., *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1277–78 n.15 (3d Cir. 1979) (*en banc*) ("Although *the underlying conduct must be outrageous to sustain liability* [for intentional infliction of emotional distress], the factfinder may conclude, on the record in a particular case, that exemplary damages would not be warranted.") (emphasis added) (cited in *Smith v. Wade*, 461 U.S. at 52 n.14).

Lower courts have consequently read *Smith* as establishing a legal standard of egregiousness that must be met before the issue of punitive damages may go to the jury in a § 1983 case. See, e.g., *Coleman*, 114 F.3d at 788 (upholding award of compensatory damages but finding that the defendant's "conduct in this case was not sufficiently egregious to justify the imposition of punitive damages"); *Cornell v. Woods*, 69 F.3d 1383, 1391 (8th Cir. 1995) (affirming liability for intentional violation of plaintiff's clearly established First Amendment rights, but holding that defendants' conduct, "though certainly not to be commended, did not rise to a level of egregiousness sufficient to justify the imposition of punitive damages"); *Ivey v. Wilson*, 832 F.2d 950, 958 (6th Cir. 1987) (citing *Smith v. Wade* in reversing jury award of punitive damages in § 1983 case); *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir. 1985) (holding that defendant's politically motivated firing of plaintiff was enough to subject him to compensatory but not punitive damages); *Lavicky v. Burnett*, 758 F.2d 468, 477 (10th Cir. 1985) (affirming judgment of liability for intentional violation of plaintiff's Fourth, Fifth, and Fourteenth Amendment rights but holding that "there was no evidence of malice, wantonness or oppressiveness to justify punitive damages"); *Wulf v. City of Wichita*, 883 F.2d 842, 867 (10th Cir. 1989) (affirming § 1983 liability for termination motivated by plaintiff's protected speech, but reversing award of punitive damages, holding that "not every intentional violation of a

plaintiff's constitutional rights subjects a defendant to punitive damages").

There was, of course, no separate punitive damages provision in § 1983 for the Court to interpret in *Smith*. Our task in this case is to construe a comprehensive statutory scheme that includes a separate standard for punitive damages. For Congress to have enacted the statutory terms of § 1981a(b)(1) merely as guidelines to channel the jury's otherwise unchecked discretion would be quite a novelty. We know of no other statutory provision that functions that way. Congress writes laws; we do not casually assume it to have done nothing more than draft jury instructions. Indeed, it is difficult to imagine where one would look to find standards that operate *as a matter of law* if not to the laws that Congress has duly enacted.

The House Report lends support to this common sense view. In speaking of the "even higher standard" the plaintiff "must meet" to get punitive damages, the Report appears to assume that the legislation will function in the normal way: by establishing a legal standard, not simply a verbal formulation to be pondered by juries with no role for the trial court. Thus, the Report notes that the § 1981a(b)(1) limitation, among others, "serve[s] to check jury discretion in awarding such damages." House Report at 72.

Kolstad contends that our insistence on preserving two meaningful tiers of liability across the range of Title VII cases is undercut by two Supreme Court opinions, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which together rejected an egregiousness requirement for "liquidated damages" under the Age Discrimination in Employment Act. But liquidated damages under the ADEA and punitive damages under Title VII are not twins. To begin with, the relevant language is different: the ADEA requires "willful" conduct, not "malice" or "reckless indifference." 29 U.S.C. § 626(b).

Further, under the ADEA liquidated damages are double damages; that is, they are always equal in amount to the

compensatory award. See 29 U.S.C. § 216(b). By contrast, although the sum of compensatory and punitive damages is capped in absolute terms under Title VII, the proportion of punitive to compensatory damages is statutorily unconstrained. Thus in an individual case the ratio may be astronomical—in principle infinite, if no compensatory damages are awarded. It is one thing to award numerically equal compensatory and liquidated damages on the basis of the same conduct (the concept of double or treble damages for a single violation is not an unfamiliar one); it is quite another to leverage a compensatory award into a punitive award that is ten or a hundred times greater, with no showing of heightened culpability.

We turn next to the reading of the statute proposed by the dissent, though not by Kolstad—a reading which preserves the form of a two-tiered structure but scarcely the substance. The argument runs as follows: Punitive damages are available when the defendant displays reckless indifference to the plaintiff's federally protected rights. If the scope or nature of a given right is sufficiently obscure, a defendant might intentionally discriminate but be merely negligent as to the existence of the right. Such a defendant would be subject to compensatory but not punitive damages. This approach in effect carves out a mistake-of-law defense to punitive liability.

We find it extremely unlikely that Congress meant to codify a mistake-of-law defense through § 1981a(b)(1), much less that it did so in "plain language," as the dissent repeatedly insists. Dissent at 1, 2, 5, 9. Contrary to the dissent's confident assurances, we find the formulation Congress chose—"with malice or with reckless indifference to the federally protected rights of an aggrieved individual"—to be an unusually imprecise and roundabout way of articulating a mistake-of-law defense. Of course there is no principle that Congress must pick the clearest or most direct expression of its standards. But the ornateness of the reasoning needed to read the section as giving juries discretion to award punitive damages for all knowing violations of Title VII, in relation to simplicity of the language Congress might have used to

achieve that result, makes such a reading extremely improbable.[5]

The improbability only increases when one reflects that the class of disparate treatment cases that could escape exposure to punitive damages on the dissent's theory is small, perhaps vanishingly so. The prohibition against basing employment decisions on sex, race, and other impermissible factors is pervasive and well understood, as the dissent itself observes. See Dissent at 5 (noting that "the statute and its prohibition against discrimination are well known to employers"). In the typical intentional discrimination case an employer could not plausibly argue that it was merely negligent as to the law's command. Nor do employers often (or advisedly) defend on the sincere but mistaken basis that religion, sex, or national origin constitutes a bona fide occupational qualification, and as a matter of law they may never make such a claim for race. See 42 U.S.C. § 2000e–2(e). Indeed, the relative implausibility of such "good faith" defenses in the Title VII context reveals another feature that distinguishes this case from *Thurston* and *Hazen*. Given the widespread belief among employers that age can sometimes be a bona fide occupational qualification—a belief reflected in mandatory retirement programs—the Supreme Court could reasonably suggest in *Hazen* that its broad reading of "willful" would not frustrate any legislative intention to create "two tiers of liability across the

[5] The dissent claims to find additional support in a phrase snatched from the crossfire in *Smith v. Wade* between Justices Brennan and Rehnquist, namely Justice Brennan's reference to "the defendant's subjective consciousness of risk . . . of *unlawfulness*." Dissent at 2 (quoting *Smith*, 461 U.S. at 38 n.6 (emphases altered by dissent)). The full sentence reads: "Justice Rehnquist consistently confuses, and attempts to blend together, the quite distinct concepts of *intent to cause* injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other." *Smith*, 461 U.S. at 38 n.6. (emphases in original). In short, the Court's treatment of consciousness of unlawfulness was, quite literally, parenthetical.

range of ADEA cases." 507 U.S. at 616. Such a suggestion would be far weaker in relation to religion, sex, or national origin discrimination under Title VII and completely out of place for the race component. If § 1981a(b)(1) does nothing more than establish a narrow mistake-of-law defense, then every garden-variety disparate treatment case qualifies for both compensatory and punitive damages—a result, as we have already said, that seems hard to square with Congress's chosen structure and language.

In its effort to show that its approach would not obliterate the difference in standards between compensatory and punitive exposure under Title VII, the dissent places considerable emphasis on the scenario involving "an attenuated agency relationship" between an employer/defendant and an employee who intentionally discriminates. Dissent at 7.[6] But even in such cases the dissent does not argue that its approach would produce a meaningful two-tiered system, in which a significant fraction of cases would go to the jury on compensatory but not punitive damages. Instead, it simply serves up another helping of the "discretionary moral judgment" argument—predicting that when "the jury focuses on the employer's ... awareness of its legal obligation," *id.*, it may be swayed by evidence that the employer has hired Title VII-sensitive managers or has provided punctilious equal employment opportunity training. Perhaps juries would be so swayed under the dissent's approach, but that does not answer the question of what legal standard Congress meant to establish by enacting § 1981a(b)(1). And as we have already noted, any test that makes the difference between compensatory and punitive exposure depend on the employer's awareness of Title VII's legal mandates is likely to produce only a negligible set of cases in which compensatory but not punitive damages are available.

[6] It is unclear just why the dissent uses the word "attenuated" to characterize the agency relationships on which it focuses. The acts the dissent goes on to describe—discriminatory "hiring or firing decision[s]," Dissent at 7–8—are "company acts" that do not involve an unusual degree of attenuation between employer/defendant and employee/wrongdoer. These are precisely the sorts of cases in which employers' claims to have misunderstood the extent of their legal obligations are least plausible.

Just as important, the dissent never explains why it believes "[a]ttribution of employee state of mind differs when the jury turns to the question of punitive damages." Dissent at 7. In Title VII cases, the defendant is the employer, and an employer is liable for "company acts"—hirings, firings, promotions, demotions—performed by employees within the scope of their employment.[7] If those acts amount to intentional discrimination, the employer is subject to compensatory damages; if the acts satisfy the requirements of § 1981a(b)(1), the employer is subject to punitive damages. There is nothing in the language of § 1981a(b)(1) that would derail this standard presumption of respondeat superior for company acts—and certainly that provision contains no clear textual invitation for courts to explore the "employer's awareness," Dissent at 8, whatever that indeterminate phrase might mean. In short, we fail to see how the dissent's special new rule of imputation for punitive damages finds any grounding in the statute's "plain language."

We note in conclusion that our decision today aligns us with all but one of the several circuit courts to address this question. See *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996) (endorsing concept of a higher standard for punitive damages under § 1981a, and noting that such damages "are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future"); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997) (holding that under § 1981a, "[p]unitive damages are an extraordinary remedy, to be reserved for egregious cases," and "are not an element of recovery in every case involving an intentional tort") (citation omitted); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence for liability and "duplicitous" actions of defendant's employees, evidence held insufficient for punitive damages); *Emmel v. Coca–Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996) (characterizing standard for punitive damages as a "higher hurdle"

[7] We need not address the scope of employer liability for "non-company acts" such as sexual harassment.

than that for proving the underlying discrimination);[8] *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (although jury could properly infer intentional sex discrimination from inconsistent nature of hiring process and failure to select and train women, it could not find malice or deliberate indifference); *Ngo v. Reno Hilton Resort Corp.*, 1998 WL 162166 (9th Cir. Apr. 9, 1998) (requiring "evidence of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases"); but see *Luciano v. Olsten Corp.*, 110 F.3d 210, 219–20 (2d Cir. 1997) (finding that no additional evidence is required for punitive liability).

The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages. As the district court noted, 912 F. Supp. at 14–15, the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales—that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997), vacated pending rehearing *en banc*, 124 F.3d 1302 (D.C. Cir.

[8] As with § 1981, the position of the Seventh Circuit on this question is not simple to characterize. The *Emmel* decision comports with the approach we take today, as do *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132 (7th Cir. 1997) (holding that evidence of egregiousness is required for punitive damages, since otherwise "every employment discrimination claim [could] include a punitive damage award because every employment discrimination plaintiff must demonstrate an intentional unlawful discrimination"), and *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1126–27 (7th Cir. 1996) (plaintiff who had already received compensatory damages not entitled to punitive damages because employer did not act recklessly or maliciously). But *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581–82 (7th Cir. 1996), a case which arose under both Title VII and § 1981, appears to point in the opposite direction.

1997), but in this case it falls far short of supplying grounds for a punitive award.[9]

There was substantial evidence to indicate that Spangler was pre-selected for the promotion, and that Kolstad was never seriously in the running. Evidence of pre-selection may of course be "relevant to the question of discriminatory intent" insofar as an employer's departure from its own hiring and promotion procedures might suggest that the reasons it advances for its actions are pretextual. *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984). But pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful. Indeed, where the selection is to be made from among a narrow band of current employees well known to the selectors, it is hard to see how there could not be a substantial degree of pre-selection—unless the decision-makers were asleep at the switch or the candidates' track records were virtually identical. The dissent lingers over the evidence concerning the process by which Spangler was promoted, see

[9] Given that a large portion of the dissent is devoted to attacking positions that the Court does not adopt, see Dissent at 11–17, we take pains here to state expressly what should be evident from a straightforward reading of our opinion. While it is true that many plaintiffs, like this one, who can offer only weak evidence of discrimination will not be able to provide any evidence at all of egregious conduct, nothing we say precludes the possibility of sparse, but nonetheless adequate, evidence of egregious discrimination. And our position in no way "amount[s] to little more than a requirement of direct rather than circumstantial evidence of discrimination as a prerequisite for punitive damages." *Id.* at 13. The showing of egregious discrimination necessary for an award of punitive damages, like any other element of a plaintiff's case, may be made through circumstantial as well as direct evidence. Nor do we hold that punitive damages may not be considered in pretext-only cases, see *id.* at 14–17, though legitimate punitive awards in such cases do seem improbable. The reasoning behind this predictive judgment is simple: a plaintiff who can demonstrate that her employer engaged in truly outrageous acts of discrimination will generally be able to offer some evidence probative of the employer's illicit motivations, rather than merely resting on a finding that its claimed motivations were unworthy of belief.

Dissent at 15–16, but the only evidence it adduces to show ADA's knowledge of "the impropriety of preselection" is a consent decree—expired at the time of the operative events—under which ADA undertook not to engage in the practice. *Id.* at 16. It scarcely bears repeating that "a consent decree is a form of contract," *Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997), not a statement of what the law considers wrongful. Consequently, evidence of pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best. For the same reason we reject Kolstad's fallback position that we should remand for a new trial on punitive damages with a direction that the trial court admit the consent decree into evidence.

The only evidence that pointed toward gender bias was Kolstad's testimony that Wheat told sexually offensive jokes at staff meetings and on occasion used derogatory terms to refer to prominent professional women. But Wheat, as mentioned above, did not make the decision to promote Spangler over Kolstad; Allen did. In any event, sexist remarks, tasteless and lamentable though they may be, are "not always conclusive of sex discrimination." *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1513 (D.C. Cir. 1995). Wheat's statements standing alone do not form an adequate basis for an award of punitive damages.

The judgment of the district court on the matter of punitive damages is

Affirmed.

RANDOLPH, *Circuit Judge, concurring*: The interpretative problem in this case starts with the interplay of the words "intentional discrimination," which suffices for compensatory damages, 42 U.S.C. § 1981a(a), and "reckless indifference," which along with the alternative "malice" is a prerequisite for punitive damages, *id.* § 1981a(b)(1). The judicial mind naturally tends to view these words against a legal background, here a Supreme Court decision defining "malice" to include recklessness, *Smith v. Wade*, 461 U.S. 30, 39 & n.8 (1982); and the common legal notion, as expressed in the MODEL PENAL CODE § 2.02(5), that "[w]hen recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly." If one fed this data into a parsing machine, it would answer—§ 1981a(a)'s standard for compensatory damages subsumes § 1981a(b)(1)'s standard for punitive damages, or whenever there is intentional discrimination there is at least reckless disregard. Yet one cannot help wondering why Congress would have enacted two separate provisions when one would have sufficed, and why all employers liable under § 1981a(a) should be swept within § 1981a(b)(1). Those who voted for this legislation surely must have believed that they were voting for a two-tiered damages system, as the majority opinion describes it. If the dissent is nevertheless correct in its interpretation, the punitive damages subsection must be the product of a very clever draftsman, someone who wanted to convey the appearance of limiting punitive damages to exceptional cases, while hoping that courts would draw upon other legal sources to find the limitation an illusion. Despite the dissent's linguistic points, the majority opinion convinces me that Congress wanted the subsections kept separate, that it intended punitive damages to be reserved for only the worst cases. The structure of § 1981a certainly points in that direction, as do the historical materials, the policies promoted by punitive damages and the other factors skillfully marshalled in the majority opinion. Although the matter is exceedingly close, I also believe the language of § 1981a(b)(1) will bear the meaning the majority opinion ascribes to it. I therefore concur.

TATEL, *Circuit Judge, with whom* EDWARDS, *Chief Judge,* WALD, ROGERS, *and* GARLAND, *Circuit Judges, join, dissenting*: A jury found that the American Dental Association ("ADA") intentionally discriminated against Carole Kolstad on the basis of sex when it denied her a promotion in favor of a male candidate. Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(1) (1994), victims of intentional employment discrimination who demonstrate that the employer acted "with malice or with reckless indifference to [their] federally protected rights" may recover punitive damages. This court now holds that Congress meant to require something more serious than intentional discrimination—some undefined quantum of egregiousness—before a jury may consider punitive damages. Because this amorphous requirement nullifies the plain language of section 1981a(b)(1)'s reckless indifference standard, and because it conflicts with Supreme Court decisions in *Smith v. Wade*, 461 U.S. 30 (1983), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), I respectfully dissent.

I

Asserting that Congress "did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII," Maj. Op. at 5, the court declares that the evidence supporting punitive damages "must exceed what is needed to show intentional discrimination," *id.* If Congress had wanted to require something more serious than intentional discrimination, however, it would have limited section 1981a(b)(1) to "malice," or it would have written the statute to require "malice or egregiousness." But section 1981a(b)(1) never mentions egregiousness. Instead, it allows the jury to consider punitive damages if the employer acts not only with malice, but also with "reckless indifference to ... federally protected rights." Because this court's duty is to "give effect, if possible, to every clause and word of [the] statute," *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (internal quotation marks omitted), we may not ignore the reckless indifference standard, but must interpret it as written by Congress. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 938–40 (1998).

According to its plain language, section 1981a(b)(1)'s "reckless indifference" threshold for punitive damages focuses on the employer's awareness of "federally protected rights." In *Smith v. Wade*, from which Congress drew section 1981a(b)(1)'s language, *see* H.R. REP. No. 102–40, pt. 1, at 74 (1991) (citing *Smith*), Justice Brennan's opinion for the Court referred to this inquiry as a measure of the defendant's "subjective consciousness of risk ... of *unlawfulness*." *Smith*, 461 U.S. at 38 n.6 (emphases altered). As this court said in a different context, " 'the wrongdoer must consciously be aware of his wrongdoing, *i.e.*, the actor must not only intend to do the act found to be wrongful, but also must know that his conduct is wrongful.' " *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) (emphasis omitted) (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1136 (D.D.C. 1988)).

Although the details of the recklessness standard remain open to debate, *see* Maj. Op. at 6 (citing *Saba*, 78 F.3d at 668–69, and *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997)); *cf. Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (discussing objective and subjective tests for reckless disregard), its basic contours are well settled; the language of section 1981a(b)(1) is not the blank slate that the court seeks to make of it. Whether relying on the employer's mental state (*Saba*) or inferring recklessness from the entire record (*Krizek*), a jury can award punitive damages under section 1981a(b)(1) if the employer either knew of Title VII's prohibitions and acted regardless or disregarded a substantial risk of violating the statute. *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984) (noting that the "usual meaning" of "reckless" is that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow").

The court and concurring opinion reject the statute's reckless indifference standard because they view it, mistakenly in my view, as "subsumed" by section 1981a(a)'s liability determination. When the jury determines liability in a Title VII disparate treatment case, it considers only whether the em-

ployer made the challenged employment decision "because of" the plaintiff's race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e–2. The employer's awareness of its legal obligations plays no role. In this case, for example, the verdict in Kolstad's favor, a verdict unanimously affirmed by the panel and not now before this court, rested solely on the jury's conclusion that ADA denied Kolstad the promotion because of her sex. ADA's liability for punitive damages, by comparison, turns on its awareness of its legal obligations: When it denied Kolstad the promotion because of sex, did it intend to violate Title VII? Did it know of its legal obligations yet recklessly disregard them? Or can reckless indifference to federally protected rights be inferred from the entire record?

Criticizing this reading of the Act, the court says that "any test that makes the difference between compensatory and punitive exposure depend on the employer's awareness of Title VII's legal mandates is likely to produce only a negligible set of cases in which compensatory but not punitive damages are available." Maj. Op. at 18. Quite apart from its entirely speculative nature, this statement disregards the fact that section 1981a(b)(1), by focusing specifically on whether the employer acted with "reckless indifference . . . to federally protected rights," in fact makes the difference between compensatory and punitive damages "depend on the employer's awareness of Title VII's legal mandates."

In addition to appearing nowhere in section 1981a, the court's new egregiousness requirement conflicts with *Smith v. Wade*'s holding that "a jury may be permitted to assess punitive damages in an action under [42 U.S.C.] § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others," *Smith*, 461 U.S. at 56. Rejecting the notion that punitive damages under section 1983 require anything as egregious as "actual malicious intent—'ill will, spite, or intent to injure,'" *Smith*, 461 U.S. at 37, the Court noted that the majority common law rule recognizes that "punitive damages in tort cases may be awarded not only for actual intent to injure or

evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence," *id.* at 48. Although citing the Restatement (Second) of Torts' view that punitive damages "punish [the defendant] for his outrageous conduct," RESTATEMENT (SECOND) OF TORTS § 908(1) (1979), *quoted in Smith*, 461 U.S. at 54, *Smith* actually draws its standard for punitive damages from the Restatement's subsequent explanation that conduct can be outrageous "because of the defendant's evil motive *or his reckless indifference to the rights of others*," *id.* § 908(2) (emphasis added), *quoted in Smith*, 461 U.S. at 46–47.

Smith also rejected the proposition, central to my colleagues' interpretation of section 1981a, that "the threshold for punitive damages should always be higher than that for liability in the first instance," *Smith*, 461 U.S. at 38; *see also id.* at 51–54. According to *Smith*, the reckless indifference threshold for punitive damages "applies even when the underlying standard of liability for compensatory damages is one of recklessness." *Id.* at 56.

The Supreme Court reached the same result under the Age Discrimination in Employment Act ("ADEA"), notwithstanding that statute's "two-tiered scheme of liability," Maj. Op. at 6. Interpreting the term "willful" as used in the ADEA, the Court held that an employer should be assessed liquidated damages, the statute's equivalent of punitive damages, if it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (quoting *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). Lower courts, concerned that the reckless disregard standard "would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct," *Hazen Paper*, 507 U.S. at 615–16, added just the kind of heightened culpability requirement that my colleagues now read into section 1981a, *see id.* at 615 (citing, *e.g.*, *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57–58 (3d Cir. 1989), which allowed liquidated damages only if employer's conduct was

"outrageous"). Flatly rejecting these decisions, *Hazen Paper* holds that "[t]he ADEA does not provide for liquidated damages 'where consistent with the principle of a two-tiered liability scheme.' It provides for liquidated damages where the violation was 'willful.' ... Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous." *Id.* at 616–17.

Read in light of *Smith* and *Hazen Paper*, section 1981a's plain language thus leaves no doubt that juries may consider punitive damages on the basis of evidence showing nothing more than "reckless indifference to ... federally protected rights." Moreover, even though the liability determination (Did the employer intentionally take account of sex?) differs from the reckless indifference inquiry (When the employer intentionally discriminated, was it aware of its legal obligations?), proof of unlawful intentional discrimination can also demonstrate reckless indifference to federally protected rights. Considering that Congress passed the Civil Rights Act over three decades ago, that the statute and its prohibition against discrimination are well known to employers, that many companies have instituted Title VII compliance programs, and that an industry of equal employment opportunity consultants and attorneys is readily available to employers in need of assistance, a jury could reasonably conclude that an employer nevertheless refusing to hire or promote a woman because of sex is worthy of punishment.

This does not mean, as the court fears, that juries will automatically award punitive damages in every Title VII disparate treatment case. Punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." *Smith*, 461 U.S. at 52. If a jury believes that an employer has acted maliciously or with reckless indifference to a plaintiff's federally protected rights, it then decides whether to punish the defendant, a determination the law leaves to the jury's "discretionary moral judgment." *Id.* Although a jury exercising its moral discretion might conclude that an employer recklessly indifferent to federally protected rights deserves punishment, a jury could also reach the opposite conclusion, that because of extenuating circumstances—*e.g.*, the employer had no history of discrimination, showed remorse, or had already taken steps to rectify the injury—the employer should not have to pay punitive damages.

Because liability and punitive damages require distinct inquiries, moreover, employers found to have intentionally discriminated in employment in violation of federal law may introduce evidence to demonstrate that they did everything they could to comply with the law and were therefore not recklessly indifferent to their legal obligations. In *Trans World Airlines, Inc. v. Thurston*, for example, the Supreme Court held that employers who intentionally violate the ADEA may nevertheless avoid liquidated damages by demonstrating that they attempted "reasonably and in good faith" to comply with the law. *Thurston*, 469 U.S. at 129. Although finding that TWA's mandatory retirement policy violated the Act, the Court denied plaintiffs liquidated damages because, by seeking legal advice and consulting with the union, TWA demonstrated that it had not acted in " 'reckless disregard' of the requirements of the ADEA." *Id.* at 130. *Cf., e.g., Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997) (noting "that the institution of a written sexual harassment policy goes a long way towards dispelling any claim about the employer's 'reckless' or 'malicious' state of mind").

For similar reasons, employers found to have intentionally discriminated in violation of Title VII may be able to persuade a jury that they had acted without reckless indifference; employers may even be able to convince a judge to remove the question of punitive damages from jury consideration altogether. For example, evidence that an employer erroneously used religion, sex, or national origin as a "bona fide occupational qualification" for employment, *see* 42 U.S.C. § 2000e–2(e), or overreached in a good-faith effort to remedy the effects of past discrimination, could demonstrate that the employer acted without reckless indifference to its legal obligations. Punitive damages might be equally inappropriate where liability rests on a novel legal theory. *See, e.g., Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (denying punitive damages although holding em-

ployer liable for dismissing female employee who had contemplated an abortion, an entirely novel theory of liability); *see also Hernandez-Tirado v. Artau*, 874 F.2d 866, 870 (1st Cir. 1989) (although intentionally violating the First Amendment in a politically motivated employment decision, defendant was only "negligent [as] to the existence of a federally protected right").

Evidence sufficient to prove liability may also fall short of establishing an employer's reckless indifference to its legal obligations where the employer's liability arises from an attenuated agency relationship with an employee found to have committed an intentional act of discrimination. Because employers are responsible for injuries caused by employees acting within the scope of employment, juries considering liability in traditional Title VII cases attribute employees' intentional use of race or sex to the employer. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring in judgment) (in the typical Title VII case "when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer"); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). Attribution of employee state of mind differs when the jury turns to the question of punitive damages. Because punitive damages are intended not to compensate the victim, but rather to punish employers for the discriminatory acts of employees, *cf. Smith*, 461 U.S. at 54 (in the punitive damages inquiry, "[t]he focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"), the jury focuses on the employer's, not the employee's, awareness of its legal obligations. Obviously, if the person discriminating is the same as the employer—in a sole proprietorship, for example—there is no difference between the employer's awareness of its legal obligations and the employee's. But where a gap exists in the agency relationship between the agent and the entity being held liable, *i.e.*, where the employee making the hiring

or firing decision does not constitute the employer's entire decision-making apparatus, the punitive damages inquiry requires the jury to examine the *employer's* awareness of the law. An employer could thus argue that even though it had been found liable for the discriminatory acts of an employee and ordered to pay compensatory damages to the victim, it should not have to pay punitive damages because it had undertaken good-faith efforts to comply with Title VII—for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and using objective hiring and promotion standards—thereby demonstrating that it never acted in reckless disregard of federally protected rights.

This interpretation of section 1981a sets up exactly the incentives Congress intended. While Congress expected victims of intentional discrimination to be compensated for their losses, it also wanted to motivate employers to detect and deter Title VII violations. *See* H.R. REP. No. 102–40, pt. 1, at 69–70 (recounting testimony encouraging employers to design and implement effective structures to combat discrimination). Giving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes just this purpose. Employers making no such efforts will not only have to compensate victims, but may be punished for their reckless indifference to federal law.

Applying section 1981a(b)(1)'s reckless indifference standard to the facts of this case, I believe the district court should have allowed the jury to consider punitive damages. Found to have intentionally discriminated against Kolstad, ADA never argued that it made good-faith efforts to comply with the law; the case involves no novel issues of Title VII liability; and the decision to deny Kolstad the promotion was made not by a low-level employee, but by ADA's executive director. Under these circumstances, the jury should have been allowed to consider whether in denying Kolstad a promotion because of her sex ADA acted with reckless indifference to her federally protected rights.

The court spends most of its opinion struggling to avoid the plain language of section 1981a and the holdings of *Smith* and *Hazen Paper*. It begins by detecting an egregiousness standard in section 1981a's legislative history. Contentious and partisan, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994), the Act's legislative history actually manifests contradictory signals regarding congressional intent about punitive damages. As the court acknowledges, *see* Maj. Op. at 9, the House Report it relies on for a "heightened" standard cites two irreconcilable section 1981 cases—*Beauford v. Sisters of Mercy–Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1987), limiting punitive damages to "egregious" cases, and *Rowlett v. Anheuser–Busch, Inc.*, 832 F.2d 194, 205–06 (1st Cir. 1987), holding that plaintiffs need prove nothing beyond intentional discrimination for juries to consider punitive damages. The court's egregiousness standard comports with *Beauford*. My interpretation of section 1981a comports with *Rowlett*. Given the clarity of section 1981a's text, we should follow the statute rather than selective bits of its confused legislative history.

Next, appearing to concede that Congress drew the language of section 1981a(b)(1) from *Smith*, *see* Maj. Op. at 10, the court then reads *Smith* to require proof of egregiousness for punitive damages, *see id.* at 12. Even if recklessly violating the Eighth Amendment is somehow more egregious than intentionally discriminating in employment on the basis of sex or race in violation of federal law, *see id.* at 11, it does not follow that because liability in *Smith* required "base, inhumane and barbaric" action, *Smith*, 461 U.S. at 32, the standard for punitive damages must always include "some form of egregiousness," Maj. Op. at 11. Like the rest of the court's opinion, its reliance on *Smith*'s underlying standard for liability rests on its failure to acknowledge that the punitive damages inquiry depends not on the seriousness of the behavior giving rise to liability, but on the defendant's awareness of its legal obligations. Both "base, inhumane and barbaric" acts (Eighth Amendment) and intentional discrimination in employment (Title VII) can be committed with "reckless indifference to . . . federally protected rights."

The court relies on *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), but nothing in that case casts doubt on *Smith*'s holding that proof of reckless indifference suffices for punitive damages. Noting in dicta that punitive damages are available on a showing of "requisite intent," *id.* at 306 n.9, *Stachura* drew the "maliciously, or wantonly, or oppressively done" standard not from *Smith*, but from the jury instruction under review in that case, *see id.* Moreover, while our sister circuits have split over the meaning of *Smith*, *compare* Maj. Op. at 14–15 (collecting cases reading *Smith* to require egregiousness), *with, e.g., Savarese v. Agriss*, 883 F.2d 1194, 1203–04 (3d Cir. 1989) (rejecting heightened culpability requirement under *Smith*); *Melear v. Spears*, 862 F.2d 1177, 1187 (5th Cir. 1989) (applying *Smith*'s reckless indifference standard without proof of egregiousness), we have consistently read *Smith*'s reckless indifference standard without adding an egregiousness requirement, *see, e.g., Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1239 (D.C. Cir. 1997) (applying *Smith* to the Fair Housing Act); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (applying *Smith* to section 1981).

My colleagues make two unpersuasive attempts to distinguish *Hazen Paper*'s clear rejection of their "two-tiers" rationale. Asserting first that the ADEA's "willful" standard has no bearing on the "malice" or "reckless indifference" required under section 1981a(b)(1), Maj. Op. at 15, the court ignores *Thurston*'s holding that "willful" conduct includes "reckless disregard," a term courts use interchangeably with "reckless indifference," *see, e.g., Williams v. Borough of West Chester*, 891 F.2d 458, 464 n.10 (3d Cir. 1989).

Second, the court points out that unlike the double damages authorized by the liquidated damages provision of the ADEA, the ratio between compensatory and punitive damages under Title VII is potentially unlimited. Maj. Op. at 15–16. This observation is interesting, but Congress chose to deal with the risk of disproportionate punitive damages

awards under Title VII by preserving judges' traditional oversight of jury discretion. *See* H.R. REP. No. 102–40, pt. 1, at 72 ("Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss."). I have no doubt that district courts—and if necessary, circuit courts—have all the authority they need to correct disproportionate awards, particularly an "infinite[ly]" disproportionate award, Maj. Op. at 16, should one ever occur. Equally significant, when enacting the Civil Rights Act of 1991, Congress carefully limited punitive damages in other ways. It capped total damages at between $50,000 and $300,000 depending on the employer's size, 42 U.S.C. § 1981a(b)(3), and barred punitive damages altogether in disparate impact cases, *see id.* § 1981a(a)(1), in mixed motive cases, *see id.* § 2000e–5(g)(2), and against governmental defendants, *see id.* § 1981a(b)(1). Because Congress itself carefully cabined punitive damages, it is particularly inappropriate for this court to add a limitation not found in the language of the statute. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so...." *Brogan v. United States*, 118 S. Ct. 805, 811–12 (1998).

III

Not only does the court's egregiousness standard conflict with the language of section 1981a and with *Smith* and *Hazen Paper*, but my colleagues offer no clear definition of the term, shifting from one interpretation to another and leaving district courts little guidance.

Egregiousness as a Measure of the Seriousness of the Discrimination

Initially, the court equates egregiousness with the seriousness of the underlying discrimination. *See* Maj. Op. at 2, 5. But unlike reckless indifference, or even malice, which also focuses on an employer's state of mind, *see, e.g., Dellums v. Powell*, 660 F.2d 802, 808 (D.C. Cir. 1981) (noting that malice is a subjective inquiry), the jury considers the seriousness of

the underlying intentional discrimination in setting compensatory damages; the more egregious the harm, the greater the compensation awarded. Of course, the egregiousness of the violation can *relate* to the punitive damages inquiry in the sense that egregious discrimination can be probative of malice or reckless indifference. To consider egregiousness in awarding punitive damages, however, the jury must make an inference not required at the liability stage: that the egregiousness of the discrimination suggests malice or reckless indifference to federally protected rights.

The court's effort to define egregiousness as a measure of the severity of discrimination suffers from several other defects. At one point, for example, the court defines egregiousness as "a pervasive pattern of discriminatory acts." Maj. Op. at 13. Not only does the court provide no support for this new standard, but exposing only those employers to punitive damages who commit multiple acts of discrimination essentially allows employers to engage in a single act of invidious discrimination without fear of punitive damages.

Offering still another definition, again without citation, the court says that egregiousness might be demonstrated by an employer's "genuine spite and malevolence." *Id.* Not content to read the reckless indifference standard out of the statute, the court here tinkers with section 1981a's other punitive damages test, suggesting that it requires not just "malice," but some kind of "genuine" malice, whatever that means.

Under any of these iterations of egregiousness-as-a-measure-of-seriousness, it is entirely unclear how district judges will determine when intentional discrimination is sufficiently non-egregious to take the issue from the jury. Never offering a clear answer, the court leaves it to district courts to decide for themselves whether an employer's conduct is worthy of punishment, thus allowing judges to usurp the jury's exercise of moral judgment.

Egregiousness as a Measure of the Plaintiff's Evidence

Applying its egregiousness standard to the facts of this case, *see id.* at 20–22, the court shifts from using egregious-

ness as a reflection of the seriousness of the discrimination to a measure of the strength of Kolstad's proof. According to the court, the "only evidence that pointed toward gender bias was Kolstad's testimony that Wheat told sexually offensive jokes at staff meetings and on occasion used derogatory terms to refer to prominent professional women." *Id.* at 22. "Wheat's statements standing alone," the court says, "do not form an adequate basis for an award of punitive damages." *Id.*

Amounting to little more than a requirement of direct rather than circumstantial evidence of discrimination as a prerequisite for punitive damages, the court's approach conflicts with *Hazen Paper*, 507 U.S. at 615 (rejecting requirement of *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989), that underlying evidence of liability be direct before allowing liquidated damages). It also conflicts with this circuit's case law holding that at least with respect to proof of liability, circumstantial evidence can be as probative as direct evidence. *See, e.g., Crawford–El v. Britton*, 93 F.3d 813, 818 (D.C. Cir. 1996) (en banc) (Williams, J.) ("[T]he distinction between direct and circumstantial evidence has no direct correlation with the strength of [a] plaintiff's case."), *rev'd on other grounds*, No. 96–827, 1998 WL 213193 (U.S. May 4, 1998); *cf. Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("'[D]irect' evidence [in the Title VII mixed motive context] may be circumstantial in nature, so long as it establishes that discriminatory motive played a substantial role in the employment decision."). I see no reason why the same rule should not apply to proof of punitive damages, particularly since the presence or absence of direct evidence of intent is not necessarily an accurate measure of blameworthiness. Why, for example, is an employer who leaves behind clear evidence of its intentional, discriminatory refusal to promote one woman—"these are jobs for men"—more worthy of punishment than an employer who subtly, but equally intentionally, refuses to promote an entire class of women? Under the court's direct evidence rule, employers who effectively cover up evidence of their discriminatory intent will escape punitive

damages no matter how egregious their discrimination. Congress, acting to strengthen Title VII in the Civil Rights Act of 1991, could not have intended such a nonsensical result.

Egregiousness as a Requirement of More than Mere Pretext

Acknowledging that we are considering the question of whether rejection of a proffered nondiscriminatory rationale by itself can support a finding of intentional discrimination in a different *en banc* case, *see* Maj. Op. at 20 (citing *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir.), *judgment vacated pending reh'g en banc*, 124 F.3d 1302, 1302 (D.C. Cir. 1997)), the court says that in this case such evidence "falls far short of supplying grounds for a punitive award," *id.* at 21. Although punitive damage awards in pretext-only cases may be "improbable," *id.* at 21 n.9, the court's premise is entirely unsupported by the record. Properly reviewed, the evidence in this case demonstrates that the jury's verdict could have rested on much more than rejection of the employer's proffered nondiscriminatory justification. This court's job is not to weigh the evidence, as my colleagues seem to have done, but to view the evidence "in the light most favorable" to Kolstad, giving her "the benefit of every fair and reasonable inference," *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 471 (D.C. Cir. 1987). Viewed this way, the jury could have based its finding of liability—again, a finding of intentional discrimination affirmed unanimously by the panel—on much more than "rejection, as mere pretext, of ADA's proffered rationales," Maj. Op. at 20.

To begin with, the record contains evidence from which the jury could have concluded that Kolstad was the more qualified of the two candidates. A lawyer, Kolstad worked for six years as the principal legislative draftsperson for the Department of Defense, preparing testimony for congressional hearings and representing the Department's interests on Capitol Hill. Employed for four years at ADA when the position opened, Kolstad served as Director of Federal Agency Relations, handling the entire range of regulatory issues of con-

cern to ADA. She consistently received "distinguished" performance evaluations from the Director of ADA's Washington office. By contrast, Tom Spangler, the male candidate who got the promotion, began working for ADA only a year and a half before the position opened, technically failed to meet the minimum posted requirements for the position, and received negative comments about his writing ability, a skill ADA highlighted at trial as central to the position.

Although the court describes what it perceives to have been a benign, routine selection process, the record contains evidence from which the jury could have concluded that because ADA preselected Spangler for the position, the selection process was a sham. Before ADA posted the opening, Spangler met frequently with the incumbent (Jack O'Donnell), ADA did not post the position promptly after O'Donnell decided to retire, and a secretary familiar with the process testified that she thought Spangler was being groomed for the job. Leonard Wheat, head of ADA's Washington office and the person most closely supervising the competing candidates, refused to meet with Kolstad to discuss O'Donnell's position, despite frequently meeting with Spangler. Although Executive Director Dr. William Allen formally appointed O'Donnell's successor, Allen—based in ADA's Chicago headquarters—relied heavily upon Wheat's recommendation of Spangler. Assigning all legislative work to Spangler, Wheat repeatedly refused Kolstad's requests to work on legislative matters, despite their relevance to the regulatory issues she covered and her experience in the field. Formally interviewing Spangler but not Kolstad, Allen failed to review Kolstad's numerous, detailed, positive performance evaluations.

The record also contains evidence, equally minimized by the court, from which the jury could have concluded that ADA attempted to cover up Spangler's preselection. Compiling a description of O'Donnell's position a few days before posting the job, Allen edited the description to fit Spangler's qualifications. O'Donnell's position description originally stated that its "most important responsibility" was to "[m]aintain liaison with federal agencies, bureaus and Administration," corresponding directly to Kolstad's work at ADA. Tailoring the job description to Spangler's specialty, Allen added "Congress" before "federal agencies," and also added whole phrases from the position description questionnaire used to hire Spangler. As Kolstad argued, the jury could have believed that ADA, in an effort to bolster its claim that Spangler was more qualified, altered documents to justify his promotion.

Kolstad proffered a 1984 consent decree settling a class action suit brought against ADA by female employees under Title VII and the Equal Pay Act. *Resnick v. American Dental Ass'n*, No. 79–C–3785 (N.D. Ill.). Denying wrongdoing and expiring prior to the decision not to promote Kolstad, the decree showed that ADA had specific knowledge of the impropriety of preselection, as well as of the connection between preselection and employment discrimination. The decree stated that "pre-selection of a favored candidate is contrary to ADA's firm policy of giving full and fair consideration to each application. Violations of this policy will have an adverse impact on an employee's annual merit review and will be cause for discipline." The district court refused to admit the decree to prove liability, but the panel stated in a portion of the opinion not before us that the district court could admit the decree in a trial on punitive damages. *See Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1439 (D.C. Cir. 1997).

From the evidence, the jury also could have found that ADA changed its explanation for rejecting Kolstad. After telling her that she was passed over because she lacked experience with health care reform and was too valuable in her position, ADA abandoned that justification at trial, instead attacking Kolstad's general qualifications and writing ability. My colleagues ignore this testimony, but the jury was entitled to consider it as evidence of ADA's falsehood, and therefore of its discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination.") (emphasis added).

The record also contains evidence from which the jury could have concluded that Wheat, Kolstad's supervisor whose advice Allen relied on in deciding to promote Spangler instead of Kolstad, told sexually offensive jokes at the office and referred to professional women as "bitches" and "battleaxes." Although this testimony may have been "contested" (the panel's word) or even "hotly contested," (the court's words), nothing in the record indicates that the testimony lacked sufficient credibility for the jury to believe it.

In addition to weighing the evidence instead of viewing it from a reasonable juror's perspective, my colleagues isolate each element of Kolstad's case, diminishing the cumulative significance of her proof. Of course, preselection "by itself," Maj. Op. at 21, violates no law, and "sexist remarks ... are 'not always conclusive of sex discrimination,'" *id.* at 22 (quoting *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1513 (D.C. Cir. 1995)). As in even the most compelling cases of discrimination, any aspect of Kolstad's case taken in isolation might seem minimal. Considering her evidence together, as this court must, *see, e.g., Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1140 (7th Cir. 1994), and reviewing it "in the light most favorable" to Kolstad, giving her "the benefit of every fair and reasonable inference," *Anderson*, 820 F.2d at 471, the jury could have concluded that this record contains substantial circumstantial, perhaps even direct, evidence of invidious, intentional, unlawful discrimination that society no longer tolerates. Therefore, even if punitive damages are "improbable" in a case where the verdict rests on no more than the jury's rejection of the employer's nondiscriminatory rationale, this is not that case.

IV

Because this court has found that the record contains sufficient evidence to support the jury's finding of intentional discrimination on the basis of sex, and because ADA never attempted to justify its use of sex in the promotion decision,

never disavowed the actions of its agents (Wheat and Allen), never offered evidence that it had taken any specific steps to comply with Title VII, and never otherwise demonstrated that in intentionally discriminating against Kolstad, it had not acted with reckless indifference to her federally protected rights, I would remand for a trial on punitive damages.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 1996 Decided March 21, 1997

No. 96–7030

CAROLE KOLSTAD,
APPELLANT/CROSS-APPELLEE

v.

AMERICAN DENTAL ASSOCIATION,
APPELLEE/CROSS-APPELLANT

Consolidated with
96–7047

Appeals from the United States District Court
for the District of Columbia
(No. 94cv01578)

Joseph A. Yablonski argued the cause and filed the briefs for appellant/cross-appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Bruce S. Harrison argued the cause for appellee/cross-appellant. With him on the briefs was *Elizabeth Torphy-Donzella.*

Before: WALD, WILLIAMS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WILLIAMS.

TATEL, *Circuit Judge*: A jury awarded Carole Kolstad back pay after finding that her employer had violated her rights under Title VII of the 1964 Civil Rights Act by denying her a promotion because she is a woman. The district court entered judgment against the employer in the amount of the jury award, but denied Kolstad further relief. Because the jury could reasonably find from the evidence that Kolstad's employer intentionally discriminated against her on the basis of sex, we hold that the district court properly denied the employer's motion for judgment as a matter of law, but that it erred in refusing to instruct the jury on punitive damages. We thus remand the case for trial on Kolstad's punitive damages claim and for reconsideration of her claims for further equitable relief and attorney's fees.

I

A Chicago-based professional association, appellee and cross-appellant, the American Dental Association (ADA), maintains an office in Washington, D.C. to represent its members' interests before Congress and various federal agencies. In September 1992, Jack O'Donnell, the second-highest ranking employee in ADA's Washington office, announced his retirement at year's end. O'Donnell held the dual-titled position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. His responsibilities included developing and communicating ADA's positions on federal legislation and regulations affecting its membership, and managing tri-annual meetings of the Council on Governmental Affairs, a policy-making body composed of ADA members.

Upon learning of O'Donnell's retirement, appellant Carole Kolstad, then serving as ADA's Director of Federal Agency Relations, and Tom Spangler, then ADA's Legislative Counsel, each expressed interest in O'Donnell's job. A lawyer, Kolstad had handled federal regulatory issues at ADA for four years, consistently receiving "distinguished" performance evaluations from the Director of ADA's Washington office, a position held in 1992 by Leonard Wheat. Earlier in her career, Kolstad had spent six years in the General Counsel's office of the Department of Defense, where she drafted proposed legislation, prepared testimony for Congressional hearings, and represented the Department's interests on Capitol Hill. Also a lawyer, Spangler had worked at ADA for twenty months, focusing on legislative issues facing the organization. He too had received "distinguished" performance evaluations from Wheat. Prior to joining ADA, Spangler had spent five years lobbying Congress on behalf of the National Treasury Employees Union. Kolstad and Spangler each had experience working with O'Donnell, with Spangler principally supporting his lobbying efforts and Kolstad, his management of the Council.

Although Wheat had the authority to name O'Donnell's replacement, he asked Dr. William Allen, ADA's Executive Director in Chicago, to make the appointment. After consulting with Wheat, Allen drafted a revised "Position Description Questionnaire" for O'Donnell's job that incorporated verbatim many of the job responsibilities recorded on the Position Description Questionnaire that had been used to hire Spangler for the Legislative Counsel position in 1991. In October 1992, three months before O'Donnell's retirement, Wheat signed a performance evaluation of Spangler that listed as one of Spangler's 1993 goals to "provide management and administrative support ... for the Council on Government Affairs," work that O'Donnell was then performing.

Spangler formally applied for O'Donnell's position once posted in mid-November 1992. After writing Allen that Wheat had refused for several weeks to meet with her to discuss her interest in the position, Kolstad also applied. Following interviews with both Spangler and Kolstad, Wheat

recommended Spangler for the job. Allen then offered Spangler the promotion, which he accepted. Informing Kolstad of the decision, Allen explained that she lacked experience with health care reform and was too valuable to ADA in her current position to take on O'Donnell's job.

After exhausting her administrative remedies before the Equal Employment Opportunity Commission, Kolstad filed suit, charging ADA with unlawful employment discrimination and seeking equitable relief, 42 U.S.C. § 2000e–5(g)(1), and damages, 42 U.S.C. § 1981a (1994). In her complaint, Kolstad demanded a jury trial on all claims. Prior to opening arguments at trial, Kolstad informed the district court that the parties had agreed to try her claims for equitable relief to the court, with the jury rendering an advisory verdict on back pay pursuant to Federal Rule of Civil Procedure 39(c). The court agreed to try to the bench Kolstad's claim for the equitable remedy of instatement, but declined to rule on whether the jury would render an advisory verdict on the back pay claim. Kolstad proceeded to try her case to the jury, introducing evidence to support an award of back pay. At the close of evidence, the district court denied ADA's motion for judgment as a matter of law, but dismissed Kolstad's claims for compensatory and punitive damages, finding insufficient evidence to support them. With respect to back pay, the court stated, "I am going to put it to the jury and we can leave until after the fact whether it's advisory or binding."

Answering two special interrogatories, one on liability and the other on "damages," the jury found that ADA had unlawfully discriminated against Kolstad on the basis of sex, awarding her $52,718, precisely the amount she sought as back pay. Kolstad then moved for instatement into the position occupied by Spangler and for attorney's fees. ADA renewed its motion for judgment as a matter of law. In a memorandum opinion, the district court denied both motions. *Kolstad v. American Dental Ass'n*, 912 F. Supp. 13 (D.D.C. 1996). After concluding that the jury could properly find unlawful discrimination from the evidence, and that the jury's award of

back pay was "conclusive" under Rule 39(c), the court held that Kolstad was not entitled to further equitable relief or attorney's fees because she had failed to prove "to the Court's satisfaction" that she was a victim of sex discrimination. *Id.* at 14 n.1, 15–16. The court entered judgment against ADA in the amount of the jury award.

On appeal, Kolstad challenges the district court's refusal to allow the jury to consider an award of punitive damages, as well as the court's denial of her claims for instatement into the Director's job and attorney's fees. ADA cross-appeals the court's denial of its motion for judgment as a matter of law and the court's ruling that the jury's verdict was binding.

II

We begin with ADA's challenge to the district court's denial of its motion for judgment as a matter of law. Reviewing the district court's ruling *de novo*, we ask whether the evidence was sufficient for a reasonable jury to have reached the challenged verdict. *Mackey v. United States*, 8 F.3d 826, 829 (D.C. Cir. 1993).

Title VII of the 1964 Civil Rights Act provides that:

> It shall be an unlawful employment practice for an employer—
>
> (*l*) to fail or refuse to hire ... or otherwise to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's ... sex....

42 U.S.C. § 2000e–2(a). In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court set forth the basic allocation of burdens and order of proof in Title VII cases alleging discriminatory treatment, as the complaint does in this case. The plaintiff bears the initial burden of proving a prima facie case of discrimination. *Id.* at 802. Where sex discrimination in promotion is alleged, a plaintiff proves her prima facie case by showing that she is female, that she was refused a position for which she applied and was qualified, and that the employer filled the position with a

male. *See Valentino v. United States Postal Serv.*, 674 F.2d 56, 63 (D.C. Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981). If established, the prima facie case raises an inference of discrimination that the employer may rebut with evidence of legitimate, nondiscriminatory reasons for the plaintiff's rejection. *McDonnell Douglas*, 411 U.S. at 802. The plaintiff then bears the ultimate burden of persuading the jury of intentional discrimination, which she may satisfy by proving that the defendant's proffered reasons were pretexts for unlawful discrimination. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996); *see McDonnell Douglas*, 411 U.S. at 802–805.

As in the district court, ADA concedes that Kolstad "met the paper qualifications for the vacancy," Appellee/Cross-Appellant's Br. at 37, and that the jury could have reasonably found that, despite her qualifications, "Kolstad never was in the running" for the Director's job because Executive Director Allen had decided, before the vacancy was posted, that Spangler was the best candidate to replace O'Donnell. Appellee/Cross-Appellant's Reply Br. at 10. ADA argues, however, that even assuming Spangler's preselection for the position, no reasonable jury could have concluded that Kolstad was a victim of sex discrimination because the evidence overwhelmingly demonstrates legitimate nondiscriminatory reasons for Kolstad's rejection. We disagree.

An employer's preselection of a job candidate, in violation of its own procedures requiring fair consideration of qualified applicants, is "undeniably relevant to the question of discriminatory intent," *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), and "operates to discredit the employer's proffered explanation for its employment decision," *Goostree v. State of Tenn.*, 796 F.2d 854, 861 (6th Cir. 1986); *see also Krodel*, 748 F.2d at 709 (improper selection procedures relevant to determination that employer's nondiscriminatory explanation unworthy of belief). Here, evidence that Allen "cut-and-paste" Spangler's job responsibilities into the Position Description Questionnaire for O'Donnell's position, that Office Director

Wheat agreed that Spangler's goals for 1993 included performing portions of O'Donnell's job, and that Spangler began meeting extensively with O'Donnell as soon as his retirement was announced permitted the jury to conclude that ADA had selected Spangler to succeed O'Donnell before the posting of the position in November 1992. From evidence that Allen did not review Kolstad's performance evaluations or resume, failed to interview Kolstad for the position, and gave Kolstad a different explanation for her rejection than the one subsequently offered by ADA, the jury could also have reasonably found that ADA's claimed nondiscriminatory reasons for choosing Spangler over Kolstad—that Kolstad lacked recent legislative experience and strong writing skills—were after-the-fact rationalizations unworthy of belief.

We have held that a jury's "rejection of the employer's nondiscriminatory reasons, while not sufficient to *compel* a finding of discrimination, nonetheless suffices to *permit* such a finding." *Barbour*, 48 F.3d at 1277; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). As the Supreme Court has observed, "'no additional proof of discrimination is required.'" *Hicks*, 509 U.S. at 510 (quoting *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992)). Thus, "a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the fact finder, if so persuaded, may infer discrimination." *Barbour*, 48 F.3d at 1277. Because Kolstad introduced sufficient evidence for the jury to conclude both that she had proven a prima facie case of discrimination and that ADA's proffered reasons were pretextual, the jury could have reasonably concluded that Kolstad proved intentional sex discrimination.

As in *Barbour*, while we need not speculate about the jury's reasoning, it could have inferred that Kolstad's sex—and not her qualifications—motivated ADA's actions. That inference could reasonably flow from Kolstad's prima facie case and the evidence of Spangler's preselection, as well as from Kolstad's testimony, contested but not incredible, that Wheat ignored her efforts to discuss the promotion, denied her other career-

enhancing opportunities, told sexually offensive jokes at staff meetings, and referred to several professional women as "bitches" or "battleaxes." Although Wheat did not formally appoint O'Donnell's successor, he had the authority to do so, recommending to Allen that Spangler and not Kolstad get the job. Consistent with our cases and the evidence at trial, the district court properly denied ADA's motion for judgment as a matter of law.

III

Having decided that the jury could reasonably find that ADA intentionally discriminated against Kolstad, we next address Kolstad's challenge to the district court's dismissal of her claim for punitive damages.

Finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," 42 U.S.C. § 1981 (note) (1994) (Congressional Findings), Congress enacted the Civil Rights Act of 1991, significantly expanding the monetary relief potentially available to victims of unlawful discrimination. *See* 42 U.S.C. § 1981a; *Landgraf v. USI Film Products*, 511 U.S. 244, 252–55 (1994). The Act provides that a plaintiff who proves intentional discrimination in violation of Title VII may recover compensatory and punitive damages in addition to equitable relief available under prior law. 42 U.S.C. § 1981a(a). Punitive damages may be awarded "if the [plaintiff] demonstrates that the [defendant] engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Act caps punitive damages, along with compensatory awards, at between $50,000 and $300,000, depending on the employer's size. 42 U.S.C. § 1981a(b)(3).

Relying on an excerpt from the Act's legislative history, ADA argues that Congress intended Title VII plaintiffs to recover punitive damages only in "extraordinarily egregious cases," suggesting that the quantum of proof necessary to sustain such an award is greater than courts have traditional-

ly required. *See* 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Mem. of Sen. Dole *et al.*). In response, Kolstad points to legislative history expressly contradicting this assertion: "Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981." *See* 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Interp. Mem. of Rep. Edwards). Decisive to us, however, is section 1981a's plain language, which tracks the standard that courts had previously established for the proof required to sustain awards of punitive damages under other federal civil rights statutes. *See Smith v. Wade*, 461 U.S. 30, 56 (1983) (plaintiff must prove "evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others" for punitive award under § 1983); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (applying same standard under § 1981). That standard, in turn, is rooted in the common law. *See, e.g.*, Restatement (Second) of Torts § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."); *see also Wade*, 461 U.S. at 38–49. We think that if Congress had meant the courts to depart from well-established legal standards, it would have made that intention clear in the language of the Act. Because it did not do so, instead choosing language already laden with meaning, and because we find no authoritative legislative history to suggest otherwise, we hold that the standard of proof required to sustain awards of punitive damages under 42 U.S.C. § 1981a is the same as that previously established for punitive awards under 42 U.S.C. §§ 1981 and 1983.

As both the Supreme Court and this court have explained, "evidence that suffices to establish an *intentional* violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided that the jury, in its 'discretionary moral judgment,' finds that the conduct merits a punitive award." *Barbour*, 48 F.3d at 1277 (emphasis added) (citations omitted) (quoting *Wade*, 461 U.S. at 52). In such cases, "[n]o additional evidence is required," *id.*, because "the

state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987). Having concluded that the jury could reasonably find from the evidence that ADA intentionally discriminated against Kolstad, the district court should have instructed the jury that upon the requisite finding—malice or reckless indifference to Kolstad's rights—it could consider a punitive award. The evidentiary threshold having been reached, discretion to award punitive damages, within the limits set by statute, lay with a properly instructed jury, not the court.

Citing legislative history from the unadopted House version of the 1991 Act and case law from other jurisdictions, our dissenting colleague argues that "something substantially more blameworthy" than "garden-variety" intentional race or sex discrimination should be required before a jury may consider a punitive award under § 1981a. Dissent at 1, 11. We note that the House Report on which the dissent relies states clearly that the new law "sets the same standard courts have applied under § 1981," H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 74, and cites the First Circuit's decision in *Rowlett v. Anheuser-Busch*, as well as *Smith v. Wade*, cases which support, in our view, this court's § 1981 jurisprudence. Consistent with our holding in *Barbour* and the Supreme Court's reasoning that "society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others," *Wade*, 461 U.S. at 54–55, we can conceive of no principled basis for second-guessing the jury's "discretionary moral judgement," *id.*, about which acts of intentional discrimination are sufficiently "outrageous" or "egregious" to merit punitive awards. Nor, as the dissent admits, do the cases from our sister circuits supply one, much less the smattering of state court cases which the dissent implies have worked some change in the common law since *Wade*. If, as the dissent suggests, something is missing from Kolstad's case *as a matter of law*, what is it? Or, as the First Circuit put the question in a different context, "can it really be disputed that intentionally discriminating against a black man

on the basis of his skin color is worthy of some outrage?" *Rowlett*, 832 F.2d at 206. Absent persuasive answers to these questions or further guidance from Congress, we leave the decision to award punitive damages for intentional civil rights violations to the jury.

By our decision today, we do not suggest that evidence sufficient to establish liability under Title VII for intentional discrimination will always sustain an award of punitive damages under section 1981a. Not every employment practice violating Title VII is "obviously the kind of conduct that society normally will not tolerate." *Hernandez-Tirado v. Artau*, 874 F.2d 866, 869 (1st Cir. 1989) (setting aside punitive damages in § 1983 case of politically motivated demotion of public official). Rather, it may be "conduct that sometimes is lawful and sometimes is not, depending on a complex set of legal rules ... that a particular [employer] might, or might not, actually understand." *Id.* at 869–70. Thus, where an employer does not deny discrimination but defends on the ground that the discrimination is not unlawful, evidence sufficient to support a finding of liability might not also support a finding of malice or reckless disregard of federally protected rights. For example, evidence that an employer erroneously used religion, sex, or national origin as a "bona fide occupational qualification" for employment, *see* 42 U.S.C. § 2000e–2(e), may be insufficient to support an award of punitive damages. Evidence that an employer overreached in its efforts lawfully to remedy the effects of past discrimination likewise might be insufficient to establish that the employer acted maliciously or recklessly. In such cases, although the challenged employment practice amounts to "intentional" discrimination, it may only be "negligent [as] to the existence of a federally protected right," *Hernandez-Tirado*, 874 F.2d at 870. We also think that where intentional discrimination occurs outside the scope of the agency relationship between employer and employee—in a hostile work environment case, for example—evidence sufficient to support employer liability may not establish that the employer maliciously or recklessly permitted the offending conduct. *See, e.g., Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809–10 (5th Cir. 1996);

see generally Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) (discussing application of agency law to hostile work environment claims). In each of these kinds of cases, the district court may need to assess separately whether evidence sufficient to support a finding of intentional discrimination also suffices to instruct the jury on punitive damages.

This case does not present these or analogous circumstances. ADA neither attempted to justify the use of sex in its promotion decision nor disavowed the actions of its agents. Rather, it flatly denied Kolstad's allegation of invidious sex discrimination, discrimination lying at the heart of Title VII that society no longer tolerates. Having produced evidence sufficient to prove her charge, Kolstad was entitled to have the jury consider whether ADA's conduct warranted a punitive award. We thus remand the case to the district court for trial on Kolstad's punitive damages claim.

This brings us to Kolstad's argument that, in a trial of her claim for punitive damages, she should be permitted to introduce in evidence a consent decree settling a prior discrimination suit brought against ADA in which the association, although admitting no liability, conceded that "preselection of a favored candidate" is contrary to its personnel policies. The district court ruled the consent decree inadmissible at trial, finding its probative value as evidence of ADA's preselection of Spangler substantially outweighed by its possibly prejudicial effect on the jury. *See* Fed. R. Evid. 403. Although finding no abuse of discretion in the district court's ruling, *see Joy v. Bell Helicopter Textron, Inc*, 999 F.2d 549, 554 (D.C. Cir. 1993) (Rule 403 determination reversed only for abuse of discretion), we note the court's suggestion that it would reconsider the decree's admissibility to impeach the testimony of ADA's witnesses. Because Kolstad did not offer the document for impeachment purposes, we express no opinion on whether, or in what circumstances, the consent decree might now be admissible as evidence to support Kolstad's claim for punitive damages. *See Johnson v. WMATA*, 883 F.2d 125, 130 (D.C. Cir. 1989) (in Rule 403 balancing, court must consider probative value in light of other evidence at trial).

IV.

We turn finally to the parties' respective challenges to the district court's treatment of the jury's verdict. ADA argues that the district court erred by ruling that the jury's verdict was binding on the court. Because the parties had agreed that the jury would sit only in an advisory capacity with respect to back pay, and because back pay was the only claim for relief to reach the jury, ADA contends that the jury's verdict was advisory in its entirety, and that we should remand the case to the district court for findings of fact and conclusions of law under Federal Rule of Civil Procedure 52. Kolstad disagrees, arguing that because she was entitled to a jury trial on her claims for compensatory and punitive damages, *see* 42 U.S.C. § 1981a(c), the district court was bound to accept the jury's verdict notwithstanding the dismissal of those claims. She thus contends that the district court erred in rejecting her claims for further equitable relief and attorney's fees based on the court's independent view of the evidence. Although we agree that the district court erred in its treatment of the jury's verdict, we conclude that the proper disposition of this case lies in between the parties' competing positions.

To begin with, we agree with Kolstad that the jury's determination of liability must remain undisturbed. But for the court's error in dismissing Kolstad's punitive damages claim, the jury's verdict would have been conclusive, as a claim for punitive damages capable of withstanding summary judgment entitled Kolstad to a jury trial. Furthermore, when the district court expressed its view that the evidence was insufficient to support an award of either compensatory or punitive damages, ADA neither moved to dismiss the jury nor expressly argued, as it does now, that the jury's determination of liability could therefore only be advisory. Rather, ADA's counsel suggested that "the issue for the jury, if the court were to have the jury provide an advisory verdict *on damages*, would be whether Ms. Kolstad is entitled to back pay...." As a result, the district court framed this question, "[A]re you agreed that if I allow the jury to deliberate *on damages*, it is an advisory verdict *to the extent that it represents back pay?*" Although the record is not entirely clear on this point, it seems to us that both the parties and the court were operating on the assumption that the jury would conclusively decide the question of liability, regardless of whether the jury's determination of the back pay award was only advisory.

As to the question of back pay, we agree with ADA that the district court was not bound by the jury's verdict. Before voir dire, Kolstad represented to the district court that the parties had agreed "to the jury resolving questions in an advisory capacity with respect to the equitable relief," including back pay, under Rule 39(c). Although that rule gives the district court discretion to try equitable claims with an advisory jury, Rule 52(a) requires in such cases that the court enter its own findings of fact and conclusions of law. Fed. R. Civ. P. 39(c), 52(a). Because the record does not reflect that ADA consented to a binding jury determination of Kolstad's back pay award, the jury's verdict was advisory on that score. On remand, the district court must therefore make its own findings as to the amount of back pay, if any, Kolstad should receive.

Finally, the district court must also reconsider Kolstad's claims for further equitable relief and attorney's fees. Consistent with the Seventh Amendment's command that "no fact tried by a jury[ ] shall be otherwise re-examined in any Court of the United States," U.S. Const. amend. VII, "when a case contains claims triable to a jury and claims triable to the court that involve common issues of fact, the jury's resolution of those issues governs the entire case." *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984); *see generally Dairy Queen v. Wood*, 369 U.S. 469 (1962). As our sister circuits have uniformly held in cases involving allegations of intentional discrimination, the district court must therefore follow the jury's factual findings with respect to a plaintiff's legal claims when later ruling on claims for equitable relief. *See, e.g., Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 873–74 (2d Cir. 1992); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (citing additional cases). Contrary to this principle, the district court here

denied Kolstad's claim for instatement, as well as her petition for attorney's fees, on the ground that she had not proven her claim of intentional sex discrimination "to the Court's satisfaction." Because we agree with the district court that the jury's finding of intentional discrimination must be upheld, Kolstad is entitled to have her claims for equitable relief and attorney's fees properly considered by the court in light of the jury's verdict.

Affirming the district court's denial of ADA's motion for judgment as a matter of law, we remand the case to the district court for trial on punitive damages and for reconsideration of Kolstad's claims for equitable relief and attorney's fees.

So ordered.

WILLIAMS, *Circuit Judge*, concurring in part and dissenting in part. I concur in much of the decision, but not in the conclusion that in a Title VII suit the minimum standard of evidence for punitive damages is, with narrow exceptions, no higher than the standard for liability. See Maj. Op. at 8–12.

The 1991 Civil Rights Act authorizes punitive damage awards in Title VII cases where the defendant engaged in the discriminatory act "with malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1) (1994). The majority concludes that in the ordinary claim of sex discrimination, which must be intentional to be actionable (except for "disparate impact" liability, for which the statute expressly precludes punitive damages), the jury is automatically empowered to find malice or reckless indifference. Maj. Op. at 9–10. The ruling may seem to manifest impeccable logic, as an intent to discriminate seems to encompass "reckless indifference" to the rights of the discrimination victim. But the upshot of the majority's view is that punitive damages are available in every case of garden-variety Title VII discrimination, excepting only a few rather unusual ones such as claims dependent on an employer's miscalculation of the bona fide occupational qualification exception. See Maj. Op. at 11–12. But if this were Congress's intent, why would there be a separate provision purporting to describe a special standard for punitive damages?

Every circuit to address the question thus far has read § 1981a to demand proof of a more culpable state of mind for punitive damages than the ordinary intent necessary for a violation of Title VII. *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996) (characterizing standard for punitive damages as a "higher hurdle" than that for proving the underlying discrimination); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence for liability and "duplicitous" actions of defendant's employees, evidence insufficient for punitive damages); *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir.

1996) (although jury could properly infer intentional sex discrimination from inconsistent nature of hiring process and failure to select and train women, it could not find malice or deliberate indifference); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (stating in dictum that "[w]hile 'intentional discrimination' suffices to recover compensatory damages, Congress requires a heightened showing of discriminatory action ... to recover punitive damages"); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 507–09 (1st Cir. 1996) (endorsing concept of a higher standard for punitive damages; rejecting district court's denial of punitive damages solely on basis of cultural factors, but acknowledging that cultural factors would "likely have an impact on [a defendant's] consciousness of wrongdoing"). None of these opinions, to be sure, offers much by way of explanation, although *McKinnon* points to a comparatively useful piece of legislative history, the House Report on language almost identical to that of the final bill:

> Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, *and must meet an even higher standard* (establishing that the employer acted with malice or reckless or callous indifference to their rights) *to recover punitive damages.*

Id. at 507, quoting H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 72 (1991) (emphasis added) ("House Report").[1] To justify creating a split with five sister circuits (particularly in light of this item of legislative history), we ought to have a powerful reason. I don't see it.

* * *

[1] The majority dismisses the House Report as involving "the unadopted House version of the 1991 Act." Maj. Op. at 10. But the only conceivably material difference in wording is that the House bill allowed punitive damages on a *broader* basis than the ultimate legislation, as it permitted them where defendant engaged in discriminatory practices "with malice, or with reckless *or* callous indifference to [plaintiff's] federally protected rights," House Report at 12 (emphasis added), the key difference being addition of the word "callous" in the alternative.

I agree with the majority's general proposition that it is sensible to look to standards rooted in the common law to understand what Congress meant when using the phrase "malice or reckless indifference." But in what seems to me the relevant context, namely decisions relating to intentional torts and of roughly the vintage of the 1991 Act, the common law appears to require a state of mind more extreme than what is required for the intentional tort on which the punitive claim is piggybacked.

In *Smith v. Wade*, 461 U.S. 30 (1983), the Court addressed the right of plaintiffs to punitive damages in cases arising under 42 U.S.C. § 1983. The claim was that the defendant prison guard had failed to protect the plaintiff inmate from harassment, beatings and sexual assault by fellow inmates. The plaintiff had proved gross negligence on the part of the guard, and thus a violation of plaintiff's Eighth Amendment right. *Id.* at 33. As § 1983 made no reference to punitive damages, the Court looked to the common law for the appropriate standard. It rejected the proposition that "actual malicious intent—'ill will, spite, or intent to injure'," *id.* at 37, was required for punitive damages, and held instead that they were allowable when the defendant's conduct was "motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others." *Id.* at 56. The Court reasoned that "the rule in a large majority of [states] was that punitive damages ... could be awarded without a showing of actual ill will, spite, or intent to injure." *Id.* at 41. A dissent by Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, read the historic record differently, arguing that "at least some degree of bad faith or improper motive" was required. *Id.* at 56. Justice O'Connor also dissented. Finding that the historical record provided no real guidance on the intent of Congress at the time of enactment in 1871, she reasoned that the majority's standard was inconsistent with the purposes of § 1983.

Obviously it is not our place to replay this argument. I make only a narrower point. In the area of intentional torts, the common law analog of intentional discrimination, courts generally require an especially egregious intent, even when

they are applying punitive damage standards *phrased* the same as the one set forth in *Smith v. Wade* and echoed in § 1981a(b)(1). In doing so, they apply the general principle that "[s]omething more than the mere commission of a tort is always required for punitive damages." W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 2, at 9 (5th ed. 1984); see also *id.* at 11 ("it is not so much the particular tort committed as the defendant's motives and conduct in committing it"). To be sure, the *Smith v. Wade* majority's reading of the "rules of ordinary tort law" in substance rejected Prosser & Keeton's. 461 U.S. at 53. But in the realm of intentional torts such a rejection has little support.

The Restatement (Second) of Torts, Section 908, for instance, asserts a generality similar to the wording of *Smith v. Wade* and of § 1981a, saying that punitive damages are allowable "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." One might expect that under this formula plaintiffs asserting any intentional tort could automatically get to the jury on punitive damages. But the comments to the Restatement draw such a claim in question. Comment b says that damages are only appropriate where there is "some element of outrage similar to that usually found in crime." See also comment d (although award of punitive damages left to jury discretion, "[i]t is error ... to award punitive damages if there has been no bad motive or wanton indifference").

Some state courts have explicitly interpreted the Restatement to require some evidence of bad motive in the intentional tort context. The Missouri Supreme Court in *Burnett v. Griffith*, 769 S.W.2d 780 (1989) (en banc), said that it "is not so much the commission of the intentional tort as the conduct or motives—the defendant's state of mind—which prompted its commission that form the basis for a punitive damage award." *Id.* at 787. "Plaintiff must prove that defendant's evil hand was guided by an evil mind." *Id.* The court *rejected* a jury instruction stating that malice "does not mean hatred, spite or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse," *id.* at 788, explaining that the language failed to

explain to jurors that "a bad motive or reckless disregard for the rights of others is required." *Id.* at 789; see also *Ryburn v. General Heating & Cooling, Co.*, 887 S.W.2d 604, 609 (Mo. App. 1994) (interpreting *Burnett* as focusing "on the matter of moral culpability so that the jury would not impose punitive sanction on a defendant for the mere commission of an intentional tort").

Similarly, the D.C. Court of Appeals has construed language at least as loose as that of § 1981a ("fraud, ill will, recklessness, wantonness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury") to require, for the tort of intentional interference with contract, something more than the intent necessary for the tort itself. *Dyer v. William S. Bergman & Assocs.*, 657 A.2d 1132, 1139 n.10 (D.C. 1995). Given the "overlap" between the state of mind needed for punitive damages and that needed for tortious interference with contract, the court said:

> [T]rial judges must be alert to the need to frame their instructions to the jury in a way that makes it clear that proof of intentional interference [with contract] does not automatically entitle the plaintiff to an award of punitive damages.
>
> Arguably, where the tort alleged is an intentional one, inherently containing elements of willfulness, an award of punitive damages must rest upon that tort being committed in an outrageous way; in other words, the "outrageousness" cannot be supplied by the conduct required to commit the tort itself.

Id. And Alaska, which at least nominally allows punitive damages for "reckless indifference" to others' interests, *Alyeska Pipeline Service Co. v. O'Kelley*, 645 P.2d 767 (Ak. 1982), in fact denies them where an intentional tort is not accompanied by evidence supporting an inference of "actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice". *Id.* at 774.

Similarly, Vermont courts have used "reckless" language, but seem to require bad motive on top of the intentional tort.

Vermont limits "exemplary" or punitive damages to cases of "malice, ill will, or wanton conduct," but includes within those terms action that is "*reckless* with regard to the plaintiff's rights." *Bruntaeger v. Zeller*, 515 A.2d 123, 127 (Vt. 1986) (emphasis added). Yet, when applying the same formulation in *State Agency of Natural Resources v. Riendeau*, 603 A.2d 360 (Vt. 1991), it held that under a statute imposing ordinary liability for "willful" violations, punitive damages could be awarded only for "bad spirit and wrong intention," and that therefore plaintiff must show "some ... bad motive [that makes the] knowing and intentional conduct malicious." *Id.* at 365; cf. *id.* (distinguishing between the meaning of "willful" in civil cases, where it is "a synonym for 'intentional'" and in criminal cases, where it has a "different and darker shade of meaning").

Cases of an insurer's *bad faith* denial of insured's claims pose a related issue. The tort's label suggests that it requires a more culpable state of mind than mere "intention," but courts in some jurisdictions allow recovery where the insurer has acted in "reckless disregard" of its lack of a reasonable basis for denial. *McCullough v. Golden Rule Insurance Co.*, 789 P.2d 855, 860 (Wyo. 1990); *Anderson v. Continental Insurance Co.*, 271 N.W.2d 368, 376 (Wisc. 1978). In any event, courts appear to have reacted with the same impulse to reserve punitive damages for egregious cases. When the Wyoming Supreme Court embraced the tort, it hastened to refute the suggestion that every such claim would entail a possibility of punitive damages, saying that plaintiff must also show "wanton or willful misconduct," *McCullough*, 789 P.2d at 861, even though Wyoming nominally allows punitive damages for "reckless indifference," *id.* at 860 n.11. The court quoted decisions from other jurisdictions requiring not only intentional breach of the duty of good faith, but "oppression, fraud, or malice." *Id.* at 861.

Wisconsin courts similarly demand an extra notch of evil:

> [T]here is a distinction between the intent or malice necessary to maintain an action for intentional tort (such as bad faith) and the intent which must be shown to recover punitive damages.... [T]here must be a showing of an evil intent deserving of punishment or something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct.

Anderson, 271 N.W.2d at 379; see also *Mid-Continent Refrigerator Co. v. Straka*, 178 N.W.2d 28, 32–33 (Wisc. 1970) (noting distinction between "the intent or malice necessary to maintain an action for an intentional tort and that necessary to recover punitive damages" and stating that "something must be shown over and above the mere breach of duty for which compensatory damages can be given").

Some courts, to be sure, take the view that where the elements of an intentional tort entail characteristics justifying punitive damages in other contexts, they are freely available even though the effect is to make punitive damages possible wherever liability is found. See, e.g., *Ellerin v. Fairfax Savings, F.S.B.*, 652 A.2d 1117, 1126 (Md. 1995) ("elements of the tort of [intentional] fraud or deceit in Maryland ... include the type of deliberate wrongdoing and evil motive that has traditionally justified the award of punitive damages"); *Owens v. Parker Drilling Co.*, 676 P.2d 162, 165 (Mont. 1984) ("where a statute is designed to protect the substantial interests of a person from a high degree of risk, and the statute is violated either intentionally or recklessly, a jury question of punitive damages is raised"); *McMullin v. Murphy*, 748 P.2d 171, 173 (Or. Ct. App. 1988) ("evidence sufficient to establish intentional fraud is also necessarily sufficient to support the requisite findings for the imposition of punitive damages, without additional or independent evidence pertaining to the culpability of the defendant's conduct or state of mind").

Perhaps lining up citations on both sides of this question is just another "unilluminating, exegesis of the common law" similar to that in *Smith v. Wade*, which Justice O'Connor there described as yielding only "inexact and contradictory language" unhelpful in interpreting a statute. 461 U.S. at 92–93 (O'Connor, J., dissenting). But that was the Court's approach in *Smith v. Wade*, and in this search for analysis by state common law courts I find the weight of authority

against the idea that just because the governing formula allows punitives for "reckless" behavior it follows that all intentional torts are eligible for punitive damages. In addition, to the extent that there appears to be a split of authority on the question, the split is less close than it appears in view of other measures taken to constrain the award of punitives.

The concern that punitive damages ought not be awarded in every case is reflected in a variety of devices designed to reduce their incidence. See generally Restatement (Second) of Torts, § 908, comment f; see also *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1618 (1996) (Ginsburg, J., dissenting) (appendix summarizing recent state legislative activity designed to reduce the incidence of punitive damages). More than half the states require that evidence supporting punitive damages be "clear and convincing," most of them doing so by statute but several by common law adjudication. See Brian T. Beasley, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?" 74 N.C. L. Rev. 2174, 2201 (1996) (appendix providing survey of punitive damage provisions in all 50 states). Although the standard of proof is not at issue in this case, the reasons for adoption of a clear and convincing standard suggest a widespread understanding that the award of punitive damages should not be an everyday event. See, e.g., *Masaki v. General Motors Corporation*, 780 P.2d 566, 574–75 (Haw. 1989) (more exacting standard because punitive damages are stigmatizing punishment of a "quasi-criminal" type); *Linthicum v. Nationwide Life Insurance Co.*, 723 P.2d 675, 681 (Ariz. 1986) (en banc) (applying higher standard because punitive damages are "only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort"); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) (adopting clear and convincing standard because of the risk posed by punitive damages if they can be "loosely assessed").

In light of this common law background, it seems improbable that in adopting § 1981a Congress intended to adopt a

punitive damage standard creating near-universal availability, despite its use of "recklessness" in the statutory formulation.

* * *

As the majority opinion makes clear, the common law is not the only source for interpretation. We can also look to how courts have interpreted a kindred provision, 42 U.S.C. § 1981.[2] Here the circuits are split, with three demanding more than mere intent to discriminate and three not doing so; of the latter, the First and Seventh decline to extend the reasoning to § 1981a.

In *Beauford v. Sisters of Mercy–Province of Detroit*, 816 F.2d 1104 (6th Cir. 1987), the court cited language from *Smith v. Wade* but then stated that punitive damages in civil rights actions have "generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant." *Id.* at 1109. Although finding enough evidence of intentional discrimination, the court said there was no evidence of "the requisite malice or reckless or callous indifference of an egregious character," so punitive damages could not be awarded. *Id.* The court in *Stephens v. So. Atlantic Canners, Inc.*, 848 F.2d 484 (4th Cir. 1988), followed *Beauford*, observing that an award of punitive damages "is an extraordinary remedy and is designed to punish and deter particularly egregious conduct." *Id.* at 489. Though the evidence was adequate for plaintiff to get to the jury on intentional discrimination, and though noting that any form of discrimination "constitutes reprehensible and abhor-

[2] Section 1981 prohibits discrimination on the basis of race in the making and enforcement of contracts. In the employment context, it overlaps substantially with Title VII, but the two differ in important respects (e.g., § 1981 applies only to racial discrimination while Title VII covers sex discrimination as well). Until 1991 one of the most important differences was the availability of compensatory and punitive damages under § 1981 but not under Title VII, a difference that made juries available for the former but not the latter. The Civil Rights Act of 1991 brings these two discrimination statutes closer together, but they remain distinct. For example, punitive damage claims under Title VII are capped, while those under § 1981 are not.

rent conduct," *id.*, the court found the evidence inadequate for punitive damages. And in *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986), a § 1983 action based upon racial discrimination, after finding the evidence adequate on liability, the court held that several of the defendants who had denied plaintiff employment had nonetheless not "acted with either the requisite ill will or callous disregard" to justify punitive damages.

In the opposite camp are this circuit, the First and the Seventh. In *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996) (voluntary settlement by parties), we held that under § 1981 the jury's (sustainable) "finding of intentional racial discrimination permitted it to find" the requisite ill will or reckless or callous indifference for punitive damages. *Id.* at 1277. The First Circuit may have a similar rule. In *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205–07 (1st Cir. 1987), it declined to adopt an aggravation requirement for punitive damages under § 1981, leaving to the trier of fact "discretion to determine whether punitive damages are necessary" where punitive damages are authorized for intentional violations. *Id.* at 205. But in *McKinnon v. Kwong Wah Restaurant* the Circuit quoted and followed the "higher standard" requirement set forth in the House Report, as noted above. See 83 F.3d at 507.

The Seventh Circuit is yet harder to characterize. In *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986), the court upheld the verdict of intentional discrimination, finding the case basically a "swearing contest," *id.* at 514, and then upheld the award of punitive damages, but only after characterizing it as "a close case," *id.* Unless there was a higher standard for punitive damages, it is hard to see why that case was "close" and the liability issue not. But in *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987), the court appeared to say that punitive damages were available for racial discrimination under § 1981 so long as "the application of the law to the facts at hand was so clear at the time of the act that reasonably competent people would have agreed on its application." *Id.* at 1296.

The position is not unlike that of the panel here, which likewise makes limited allowance for a defendant's mistake on an obscure issue of law. It may be more precise, however, to describe 7th Circuit law as in flux; as noted above, *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996), says that an award of punitive damages under § 1981a itself must surmount a "higher hurdle" than mere proof of intentional discrimination.

* * *

With this background in hand, I return to the legislative history of § 1981a. I have already noted the language of the House Report asserting that § 1981a demands of plaintiff "an even higher standard" than simple proof of intentional discrimination. See *supra* p. 2 above. The panel quotes what appear as contradictory glosses on § 1981a urged by a senator and a representative. While Senator Dole said for himself and others that plaintiffs can recover for punitive damages only in "extraordinarily egregious cases," see 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Memo of Sen. Dole et al.), Representative Edwards said that "[p]unitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981." See 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Interp. Memo of Rep. Edwards). Compare Maj. Op. at 8–9.

It is not clear to me that these views are in conflict. In light of the circuit split, Representative Edwards's comment is indeterminate. For those circuits that have required "egregious" discrimination in the § 1981 context, the two observations fit handily. Of course Representative Edwards's remark may be said to invite us to follow *our* own view of the law derived from § 1981. But that approach seems unduly self-referential. We can reconcile the otherwise disparate items of legislative history (the House Report and the Edwards and Dole statements) by following the courts that have, in applying § 1981, followed the current common law trend that, as to intentional torts, demands for punitive damages something substantially more blameworthy than the intention required for liability. This approach would

also avoid creating a split with all the circuits that have addressed the § 1981a issue.

Because I agree with the panel that the parties agreed to have liability tried to the jury, *id.* at 13–14, I do not dissent from the view that the jury verdict was binding as to liability. But the remand to the district court should not, in my view, include any direction to hold a trial on punitive damages.

APPENDIX C

In the
United States District Court
District of Columbia

Civil A. No. 94-1578 (TPJ)

Carole KOLSTAD, Plaintiff,

v.

AMERICAN DENTAL ASSOCIATION, Defendant.

Jan. 22, 1996

MEMORANDUM AND ORDER

JACKSON, District Judge.

This Title VII employment discrimination case is presently before the Court on defendant's post-trial motion for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(b), following a jury verdict for plaintiff for $52,718. The plaintiff, in turn, moves for the equitable relief of instatement to the position for which she was rejected by defendant and for an award of her attorney's fees and costs in excess of $175,000. For the reasons to follow both motions will be denied.

I.

In the fall of 1992, defendant American Dental Association ("ADA") selected one Thomas Spangler over plaintiff Carole Kolstad as its new Director of Legislation and Legislative Policy (hereinafter "Director of Legislation") in its Washington, D.C., office, the position being essentially that of chief lobbyist for the ADA before Congress. Both

candidates, then as now employees of the ADA, were deemed eligible insofar as possessing the basic qualifications for the job. The selecting official was Dr. William Allen, the ADA's interim Executive Director in Chicago, who concluded for himself (with, however, the unanimous concurrence of the incumbent Director of Legislation and all other ADA officials in both Washington and Chicago) that Spangler was the better qualified of the two and notified both candidates of his decision in mid-December, 1992.

Kolstad brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e *et seq.*, in July, 1994, alleging that, in selecting Spangler as its new Director of Legislation, the ADA had discriminated against her because of her sex. She sought instatement to the position of Director of Legislation and an award of money equal to the aggregate of the difference in the salaries she and Spangler have been paid since January of 1993.

The case was tried October 18-26, 1995, to a jury comprised of six women and two men. The jury was expressly instructed prior to their deliberations that they could award plaintiff relief only upon a finding that she had been a victim of gender discrimination. They were further instructed that the ADA's failure to treat her application fairly in any other respect gave no cause for a finding in her favor. On October 26th the jury answered a special interrogatory finding that Kolstad had been discriminated against on the basis of her sex and awarded her $52,718 in damages representing the pay differential.[1]

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[1] The Civil Rights Act of 1991, 42 U.S.C. s 1981a(c), affords a right to jury trial in Title VII cases for compensatory and punitive damages. Equitable relief, however, remains the province of the Court, including "back pay." *Id.* at (b)(2).

II.

As is often true in Title VII cases, no direct evidence of sex-based motivation on the part of the ADA was presented. Such direct evidence as the jury heard was all to the contrary; specifically, each and every official at the ADA, male and female alike, who had knowledge of the position at stake and the two candidates, and whether or not involved in the selection process, testified that they believed Spangler to be the better qualified, and to have been selected for that reason alone, without regard to sex.

Moreover, the only circumstantial evidence presented favorable to the plaintiff pointed simply to Spangler's "pre-selection," i.e., that Spangler was destined to get the job no matter who else applied. Although ADA witnesses denied it, there is certainly evidence of record from which the jury could have found, as it may well have done, that Spangler had been perceived by the ADA's hierarchy as the heir-apparent to the incumbent Director of Legislation even before the incumbent declared his intention to retire. Kolstad was regarded as both a late entry and an also-ran from the moment she announced her interest in the position. Were pre-selection in itself unlawful, the validity of the jury's verdict would be unquestionable.

What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler. For aught that appears in this record their genders might have been reversed, or they of the same sex. That one was male, and the other female, is a mere fortuity. There is simply no

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Assuming without deciding that the Court might treat the damage award as representing "back pay" and thus "advisory" only, the Court nevertheless regards it as conclusive under Fed.R.Civ.P. 39(c).

basis other than *post hoc ergo propter hoc* reasoning to relate Kolstad's rejection for the post to her gender: to wit, Kolstad is female; she was rejected in favor of a "pre-selected" male for a position for which she was qualified; *ergo,* the reason for the "pre-selection" must have been sex.

Plaintiff invokes *dictum* from the Supreme Court's most recent exposition of Title VII law in the case of *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), to the effect that a trier of fact *may* base a finding of discrimination solely on its disbelief of an employer's proffered "legitimate" reason for an adverse employment decision, although it is not compelled to do so. *See id.,* at ----, 113 S.Ct. at 2749. Here, Kolstad says, the jury obviously did not believe the ADA's witnesses, all of whom testified that, fairly comparing their credentials, Spangler's recent experience was thought to be more relevant, and that, for congressional lobbying purposes, his writing style was superior to Kolstad's.

Hicks, however, involved a non-jury trial, and the holding of the case merely reaffirmed the Supreme Court's seminal formulation of the standard of proof required to present a successful Title VII claim found in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), namely, that even a finding of "pretext," i.e., that an employer's explanation of a suspect employment decision is disingenuous, is not actionable unless shown actually to have been a pretext *for discrimination.* The *Hicks* court, in reversing a decision of the 8th Circuit that had itself overturned the decision of a district court, sitting without a jury, in favor of a defendant-employer whose professed reasons for dismissing the plaintiff-employee the district judge had nevertheless refused to credit, asserted that "the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.' " *Hicks,* 509

U.S. at ----, 113 S.Ct. at 2749. In other words, "a reason cannot be proved to be 'a pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.,* at ----, 113 S.Ct. at 2752 (emphasis in the original).

At least three appellate cases, from the 6th, 11th and 1st Circuits, albeit antedating *Hicks,* have expressly held that, in the absence of proof that a discriminatory motive underlies an adverse employment decision, disbelief of the pretextual reasons given for it cannot alone support a finding of discrimination if the evidence admits of some other--but not unlawful--motivation. *See Goostree v. State of Tennessee,* 796 F.2d 854, 862 (6th Cir.1986); *cert. denied,* 480 U.S. 918, 107 S.Ct. 1374, 94 L.Ed.2d 689 (1987); *White v. Vathally,* 732 F.2d 1037, 1040 (1st Cir.1984), *cert. denied,* 469 U.S. 933, 105 S.Ct. 331, 83 L.Ed.2d 267 (1984); *Clark v. Huntsville City Bd. of Education,* 717 F.2d 525, 529 (11th Cir.1983).[2] If *Hicks* were the only, and the most recent controlling authority, this Court would be reluctant to conclude that the requirement of at least some evidence of an illegal discriminatory animus had been abandoned. Unfortunately, *Hicks* is neither.

In a case directly on point, not yet a year old, and representing for this Court's purposes an authoritative interpretation of *Hicks,* the D.C.Circuit has held that, after a plaintiff's *prima facie* showing, juries, too (at their election, to be sure) may infer unlawful discrimination solely from a rejection of a defendant-employer's professedly innocent explanations as "pretext." *See Barbour v. Merrill,* 48 F.3d

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[2] All cited by Judge Revercomb in *Slade v. Billington,* 700 F.Supp. 1134 (D.D.C.1988).

1270, 1277 (D.C.Cir.1995). That, it would appear, is what the instant jury has done, and its verdict must therefore be allowed to stand.

Were it open to this Court to set aside the verdict under Fed.R.Civ.P. 50(c), however, the Court would do so. While the evidence may have been sufficient to have convinced the jury that Kolstad's candidacy for the position of Director of Legislation at ADA was treated cavalierly, and Spangler given a preference from the start, it is insufficient to prove *to the Court's satisfaction* that her sex or his more likely than not had anything to do with her rejection. Thus, in the absence of any grounds for action asserted other than the statutory Title VII claim of sex discrimination--Kolstad having made no claim on any other theory--the Court's equitable jurisdiction to complete the relief affords no basis for it to order a remedy for a wrong that it concludes has not been proven, the jury's verdict notwithstanding.

For the foregoing reasons, therefore, it is, this 22nd day of January, 1996,

ORDERED, that the motion of defendant American Dental Association for judgment as a matter of law is denied, and final judgment for plaintiff Carole Kolstad against the defendant in the amount of $52,718 is confirmed; and it is

FURTHER ORDERED, that the motion of plaintiff Carole Kolstad for an order of instatement to the position of Director of Legislation and an award of her attorney's fees and costs is denied.

APPENDIX D

United States Court of Appeals
For The District of Columbia Circuit

No. 96-7030
September Term, 1996
[FILED: MAY 28, 1997]

Carole Kolstad,

Appellant

v.

American Dental Association,

Appellee

Consolidated with 96-7047

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

The suggestion for rehearing *in banc* of the American Dental Association has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service voted in favor of the suggestion insofar as it pertains to the issue of punitive damages. Accordingly, it is

ORDERED that this matter will be reheard by the court sitting *in banc*. It is

FURTHER ORDERED that the judgment of the court filed on March 21, 1997, is vacated as to the issue of punitive damages.

A future order will govern further proceedings.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this order.

APPENDIX E

United States Court of Appeals
For The District of Columbia Circuit

No. 96-7030
September Term, 1996
[FILED: MAY 28, 1997]

Carole Kolstad,

Appellant

v.

American Dental Association,

Appellee

Consolidated with 96-7047

BEFORE: Wald, Williams and Tatel Circuit Judges

ORDER

Upon Consideration of the petition for rehearing of the American Dental Association, filed April 21, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Williams would grant the petition insofar as it pertains to the issue of punitive damages.

APPENDIX F

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil Rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party–

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section–

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

* * *

(R.S. § 1977A, as added Pub.L. 102-166, Title I, § 102, Nov. 21, 1991, 105 Stat. 1072.)